Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of BellSouth Telecommunications, Inc.	)	
For Forbearance Under 47 U.S.C. §160(c) From	)	WC Docket No. 04-405
Application of Computer Inquiry and Title II	)	
Common-Carriage Requirements	)	

OPPOSITION OF THE FEDERATION OF INTERNET SOLUTION PROVIDERS OF THE AMERICAS

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EXECUTIVE SUMMARY

The Federation of Internet Solution Providers of the Americas ("FISPA") is a non-profit trade association of nearly 200 independent Internet Service Providers that use and rely on the DSL transmission facilities of BellSouth, the Petitioner herein, its sister "Baby Bells" or "RBOCs," and other incumbent Local Exchange Carriers ("LECs") to provide their information services to the public. Forbearance from applying the requirements of Title II and the *Computer Inquiries* to BellSouth and allowing the use of private carriage agreements will not serve the public interest.

The Commission's duties under the Act are clear and unequivocal. Those duties, first and foremost, are to ensure that providers of telecommunications services are to do so in a non-discriminatory manner and at reasonable rates. This duty arises under both Title II and Title I of the Act. Because, at its most basic level, BellSouth's Petition seeks the freedom to act in a discriminatory and an unreasonable manner, a grant of the Petition would do violence to the most fundamental duties entrusted to the Commission by Congress under either Title.

The regulatory regime under the *Computer Inquiries* is founded on the same principles, refined and focused on the specific problems created by the conflicting roles BellSouth and other Baby Bells have in the industry as the sole source provider of the tools required by its competitors. *Computer Inquiry* permits BellSouth and its sister RBOCs to compete in the enhanced/information and now the broadband services market despite their control over the essential facilities which their much smaller customers must use to compete with them. *Computer Inquiry* effects this delicate and difficult balance of competing interests by adding requirements that are designed to neutralize some of the advantages the incumbent local carriers

have by virtue of their bottleneck control over the local exchange networks and, in particular, DSL transmission lines.

In place of these basic pro-competitive requirements, BellSouth seeks to substitute private carriage agreements, that is, agreements that it will present to its smaller competitors for negotiation. But privately negotiated agreements are not possible unless the negotiating parties have equality of bargaining power. Where such equality does not exist, the process can only produce a one-sided agreement in which the rates, terms and conditions are dictated by one party. In this case, BellSouth is the party with the ability to dictate the terms of such agreements. By its Petition, BellSouth wants to be authorized by the Commission to be able to dictate the rates, terms and conditions of the private carriage contracts without the "burdens" of non-discrimination or reasonableness. If so authorized, such agreements will be presented and enforced on a "take it or leave it" basis. As contracts of adhesion, such agreements will not be negotiated with an eye on the public interest, but with tunnel vision on BellSouth's self-serving interests.

FISPA's Opposition is based on irrefutable facts, well-established legal precedents and principles and overriding public interests. FISPA's Opposition rebuts, with hard evidence, BellSouth's self-serving claims that today's market environment allows the lifting regulations that require BellSouth to act reasonably and non-discriminatorily towards its competitors who, of necessity, are customers as well.

Numerous FISPA members have submitted sworn declarations of their continuing need to have reasonable and non-discriminatory access to BellSouth's DSL facilities; a necessity because they have investigated and attempted to use other means by which to provide their services to the public – cable, broadband over power, wireless and satellites. Their investigation

and good faith efforts have demonstrated that, for a variety of insurmountable problems, these other technology platforms are simply not usable or, in many cases, available to them. These declarations are a complete bar to BellSouth's case for forbearance. Based on direct first hand knowledge and experience they factually refute BellSouth's assertions that the market is competitive and that alternative supplies are available to independent ISPs. This strong factual case demands the application of established legal precedents and policies based on the public interest and not BellSouth's interests.

First and foremost, BellSouth's Petition does not satisfy any of the Section 10(a) forbearance criteria. Therefore, a grant of BellSouth's request for forbearance may not be made. BellSouth's Petition has failed to demonstrate that the *Computer Inquiry* and Title II common-carriage requirements are not necessary to ensure that the charges and practices for broadband services are just and reasonable and are not unjustly or unreasonably discriminatory; are not necessary for the protection of consumers; or are not necessary to protect the public interest. In addition, BellSouth has not shown that forbearance will promote competitive market conditions and enhance competition among providers of telecommunications services. If any one of these criteria is missing, forbearance is not lawful.

BellSouth's Petition is a textbook example of how not to justify lifting statutory protections of the public's interests. A decision to forbear from enforcing statutes or regulations is not a simple decision. It must be based upon a record that contains more than broad, unsupported allegations of why the statutory criteria are met; it must contain detailed evidence concerning the markets for the specific services at issue that is supported by empirical evidence. No such empirical evidence accompanies the Petition. On the contrary, the empirical evidence,

that which is submitted by FISPA herein, is to the contrary. The hard market data unequivocally demonstrates that the drastic action of forbearance cannot be and has not been justified.

Forbearance cannot be shown to serve the public interest. Stripped of all the pseudo arguments and self-serving rationalizations presented by BellSouth, BellSouth simply does not want its future broadband activities to be encumbered with the duties to be reasonable or be restrained in the slightest from playing favorites among those it allows to make use of its DSL facilities, such as BellSouth.net.

In other contexts, the Commission has made the connection of *consumer choice* with *competitive forces*. A grant of forbearance here would deny consumer's their choice of service providers and the variety of services that only a diverse and abundant source of alternative providers can offer. In today's demonstrably uncompetitive marketplace for alternative broadband access supply, removal of Title II and *Computer Inquiry* rules leaves consumers with nothing to select from but what BellSouth and her sister duopolies choose to offer. This does violence to the central theme of the Communications Act that was embodied in the Act since its adoption 70 years ago. Section 151 of the Act provides that –

> … the purpose of regulating interstate and foreign commerce in communications [is] to make available, so far as possible, to all people of the United States, without discrimination … a rapid, efficient … wire and radio communication service with adequate facilities at reasonable charges … 47 U.S.C. §151 (emphasis added).

The expressed intent of Congress in enacting the 1996 Act is the same. It is the clear duty of this Commission to ensure reasonable and non-discriminatory communications services when provided by common carriers under Title II or by any provider under Title I. The Commission's duty is to adopt and enforce policies that provides to all the people, so far as

possible, nondiscriminatory services with adequate facilities at reasonable rates. In short, BellSouth cannot escape its Title II duties -- to operate reasonably and non-discriminatorily -- any more than the Commission can shirk its duties to see to it that BellSouth does operate reasonably and non-discriminatorily, whether by Title II or Title I.

The forbearance BellSouth seeks will have a profound adverse impact on businesses in an industry enmeshed in this country's telecommunications culture. The continued existence of independent ISPs, and the diversity of choices to the public rest on their ability to continue to have access to the network facilities necessary to deliver their services.

BellSouth also attempts to circumvent the requirements of section 10(a), by relying on section 706 in support of forbearance. BellSouth argues section 706 establishes a duty under which the Commission must remove barriers to infrastructure investment in order to promote broadband competition. But the argument that forbearance from regulation would serve the goals of section 706 is nothing new. It is the same old "carrot" the Baby Bells have trotted out for many years. Just give us freedom from regulation and we will wire the world, solve the digital divide, and provide free service and products to the communications disadvantaged. Empty promises and hollow bribes of benefits will not meet the three prong test of section 10(a). Those three prongs are conjunctive. Thus, even if the Commission were to consider that BellSouth's section 706 promises lent some support to a public interest claim under section 10(a)(3), that is insufficient because, standing alone, it fails to satisfy the requirements of sections 10(a)(1) and 10(a)(2).

BellSouth's Petition does not even attempt to address the application of Section 10(d) of the Act. Section 10(d) places an explicit "[l]imitation on the remainder of section 10," providing that the "Commission may not forbear from applying the requirements of section 251(c) or 271

… until it determines that those requirements have been fully implemented." Yet, BellSouth presents no evidence to support the conclusion that a robust wholesale market exists that enables competing providers to obtain access to the telecommunications services and facilities they require to enter the market without the need for continued enforcement of section 251(c) or 271. The declarations presented by FISPA members provide solid evidence that directly contradicts BellSouth's uncorroborated claims. These declarations show that BellSouth continues to exercise market power over the facilities that ISPs use to connect consumers to the Internet.

Finally, BellSouth's Petition is fatally flawed because it does not mention, much less address, the interests protected by the Regulatory Flexibility Act ("RFA"). The RFA requires each federal agency to conduct a regulatory flexibility analysis of the impact of its actions on small businesses and places the burden on the government to review all regulations to ensure that, while accomplishing their intended purposes, they do not unduly inhibit the ability of small entities to compete.

In 1996, Congress strengthened the RFA and provided for judicial review of agency compliance with the law. Now, agency actions or inactions are directly challengeable in court. As the many declarations submitted herewith demonstrate, the ISPs' very survival depends on access from the ILECs and to that end, rely on the safeguards of Title II and *Computer Inquiry.* The Commission cannot ignore or overturn established policy designed in large part to protect these small ISPs unless it does so on a reasoned basis that rests on an adequate record and is clearly and convincingly explained by the Commission.

A proper RFA analysis dooms BellSouth's Petition. Forbearance will drive these small businesses out of the market. The effect therefore of a grant of the Petition cannot meet a major express goal of the RFA, *viz*., to provide regulatory relief to small entities.

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OPPOSITION OF THE FEDERATION OF INTERNET SOLUTION PROVIDERS OF THE AMERICAS

The Federation of Internet Solution Providers of the Americas ("FISPA"), by its attorneys, hereby submits it Opposition to the October 27, 2004, Petition for Forbearance filed by BellSouth Telecommunications, Inc. ("Petition").[1]

STATEMENT OF INTEREST

FISPA was founded in May, 1996 to represent the interests of Internet Solution Providers. Our members are called "SOLUTION" providers because they provide a range of services including Internet Access, Web Hosting, Web Design and an ever increasing number of other services that use the Internet to facilitate a "solution." FISPA offers its members education, a place to network, and to facilitate discussion and technological development. We work to educate the public about the importance of the Internet industry. We support quality standards and practices for Internet Solution Providers. We create a single voice representing the concerns of the Internet industry.

[1] *Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. §160(c) From Application of Computer Inquiry and Title II Common-Carriage Requirements*, WC Docket No. 04-405 (Oct. 27, 2004).

FISPA represents the interests of nearly 200 companies. Each offers a broad and unique range of Internet solutions, technologies, and information services to consumers across a wide swath of America. A large percentage of FISPA members provide their services in BellSouth's territory, but all will be impacted if BellSouth's Petition is granted.[2]

FISPA members and other independent ISPs have long been the engine hidden beneath the hood of the car driving the Internet and broadband revolutions. Recent telecommunications and information technology policy decisions, rulemakings, and incumbent Bell Company ("RBOC") filings which tend to diminish the value and seek to further limit and even exclude the role that small, independent ISPs play in the future of the Internet, broadband services, and information technology have awakened FISPA's members. BellSouth's Petition is but the latest example of an agenda that began in 1987 with the first Triennial Review of the Modified Final

[2] A sampling of FISPA members that will be adversely affected by forbearance have submitted declarations in support of this Opposition. Each of the attached Declarations provide irrefutable evidence showing that small ISPs, their customers and the communities they serve will be harmed if the Commission grants BellSouth's requested relief. *See e.g.,* Declaration of Alex Soya on Behalf of LexiSoft attached as Exhibit A (hereinafter referred to as "LexiSoft Declaration"); Declaration of Cliff LeBoeuf on Behalf of Computer Sales and Services, Inc., attached as Exhibit B (hereinafter referred to as "CSSLA Declaration"); Declaration of Joseph M. Albanese on Behalf of SiteStar, attached as Exhibit C (hereinafter referred to as "SiteStar Declaration"); Declaration of Jeffrey Scott Huffman on Behalf of WebKorner Internet Services, attached as Exhibit D (hereinafter referred to as "WebKorner Declaration"); Declaration of Norman Schippert on Behalf of BluegrassNet, attached as Exhibit E (hereinafter referred to as "BluegrassNet Declaration"); Declaration of James Robert Garrett on Behalf of Kinex Networking Solutions, Inc., attached as Exhibit F (hereinafter referred to as "Kinex Declaration"); Declaration of Paul Vingiello on Behalf of Bayou Internet, attached as Exhibit G (hereinafter referred to as "Bayou Declaration"); Declaration of Bill Heinz on Behalf of TampaBay DSL, Inc. and GoldCoast DSL, Inc., attached as Exhibit H (hereinafter referred to as "GoldCoast Declaration"); Declaration of Robert E. Mayfield on Behalf of ECSIS.NET, LLC., attached as Exhibit I (hereinafter referred to as "ECSIS Declaration"); Declaration of Gary Carr on Behalf of COL Networks, Inc., attached as Exhibit J (hereinafter referred to as "COL Declaration"); Declaration of Terry L. Miller on Behalf of Supernova Systems, Inc., attached as Exhibit K (hereinafter referred to as "Supernova Declaration"); Declaration of Faisal Imtiaz on Behalf of Computer Office Solutions, Inc., attached as Exhibit L (hereinafter referred to as "Computer Office Solutions Declaration"); Declaration of Paula C. Wilbourne on Behalf of Mecklenburg Communications Services, Inc., attached as Exhibit M (hereinafter referred to as "Mecklenburg Communications Declaration"); Declaration of Philip M. Decker on Behalf of World of Computers of Kinston, Inc., attached as Exhibit N (hereinafter referred to as "WCK Declaration"); Declaration of Troy Bourque on Behalf of Computer-N-Service Internet, Inc., attached as Exhibit O (hereinafter referred to as "C-N-S Declaration); Declaration of Brett Tambling on Behalf of Accelerated Data Works, Inc., d/b/a Acceleration attached as Exhibit P (hereinafter referred to as "Acceleration Declaration").

Judgment ("MFJ"),[3] an agenda whose goal is anti-competitive, anti-small business, anti-consumer and, now, anti-independent broadband provider. BellSouth's Petition has driven FISPA's members to take action.

It is believed that the Federal Communications Commission's ("Commission") leadership is largely unaware of the contributions that FISPA members and their independent ISP counterparts have made and continue to make to the national economy, advanced communications capabilities, and the extension of broadband services to smaller communities – helping to counter the so-called "digital divide." FISPA's Opposition documents the contributions of independent ISPs and establishes that it would be clearly erroneous for policymakers to decide to sacrifice decades of advancement and public interest benefits for the financial gain of a few large corporations. We aim to change the Commission's perception of small, independent ISPs from the dispensable nuisance BellSouth and other incumbents portray us as into what we are: We are the very foundation of America's Internet economy and we, not they, have driven the Internet revolution, and we, not they, will continue to drive America into the broadband future.

BellSouth's Petition ignores FISPA members and their contributions to the Internet and broadband revolutions in an effort to achieve its goal of market dominance under the guise of a cost savings of $3.50. But the record cannot be so easily distorted. As will be shown herein,

[3] In 1987, a scant three years after AT&T's Divestiture of the Baby Bells, *see United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 224 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983), the U.S. Department of Justice issued its first triennial review of the state of competition post-divestiture. *See* Peter W. Huber, The Geodesic Network, *1987 Report on Competition in the Telephone Industry*, United States Department of Justice, 1987. Incredibly, Huber's Report concluded that all telecommunications markets affected by the monopoly control of the Baby Bells were sufficiently competitive to warrant lifting MFJ restrictions and all the Bells to compete where they willed. This was 1987 when the average long distance call still cost around $0.25/minute and the commercial Internet was a decade away from its boom! Common sense, wisdom and trust in competitive markets over monopoly-driven agendas ultimately prevailed, ensuring that Huber's Report would not have its author's desired effect. The Baby Bells continue to press for re-monopolization of telecommunications markets to this day. FISPA implores the current Commission to exercise sound judgment and the foresight of its predecessors as it considers BellSouth's most recent push down this path of competitive destruction.

independent ISPs serve the public interest and their existence is critical to the continued advancement of information and Internet technologies in America.

FISPA takes this opportunity to formally introduce its members because it is important the Commission recognize our names, our contributions and the communities we serve as it considers BellSouth's Petition. We are:

1Net Transworld, Inc., Tampa, FL,
2GETON NET, INC., Corbin, KY,
ACCELERATION NET, Gainesville, FL,
AENEAS INTERNET SERVICES, LLC, Jackson, TN,
Alpha Enterprises Limited, Inc., Carney, MI,
ALWAYS ONLINE, LLC, New Bern, NC,
AMERICASGATE INTERNET SERVICES, Naples, FL,
ANEW BROADBAND, INC., Miami, FL,
Apex DSL, Coral Gables, FL,
API DIGITAL COMMUNICATIONS, Huntsville, AL,
ATLANTIC COMMUNICATIONS TEAM, Winter Gardens, FL,
Atlantic.Net, Gainesville, FL,
AugLink Communications, Inc., St. Augustine, FL,
AUSTIN MICHAEL INTERNET SOLUTIONS, Gainesville, FL,
B2 Technologies LLC, Buffalo, NY,
BAYOU INTERNET, Monroe, LA,
BitDefender LLC, Boca Raton, FL,
BlazeNet, York, PA,
Blue Ridge Internetworks, Charlottesville, VA,
BLUEGRASSNET, Louisville, KY,
BlueSky Internet, Inc., Orlando, FL,
Boca Networks. Com, Boca Raton, FL,
Brandx X Internet, Santa Monica, CA,
BroadbandONE, Inc., Boca Raton, FL,
bway.net, New York, NY,
CAMTEQ/COMPUTER ASSET MANAGEMENT, Miami, FL,
Carolina Connection, Inc., New Bern, NC,
Celito Communications, Raleigh, NC,
Citynet LLC, Panama City, FL,
CLEC Services, St. Augustine, FL,
COL NETWORKS, INC., Lumberton, NC,
Colo Solutions, Orlando, FL,
Communication Management Services, LLC, Metairie, LA,
COMPNET INTERNET SERVICE, Madisonville, TN,
Computer Central of Wilson, Inc., Wilson, NC,
COMPUTER OFFICE SOLUTIONS, INC., Miami, FL,
COMPUTER SALES & SERVICES, INC., Houma, LA,
Computer Technologies Group, Baton Rouge, LA,
COMPUTERS-N-SERVICE, INC., Morgan City, LA,
COMTREND CORPORATION, Irvine, CA,
Cook's Computer/CCP Online, St. Joseph, MO,
CSInetwork.net, St. Augustine, FL,
CyberXpress, Inc., Jacksonville, FL,
Dasia.net, LLC., Indian Trail, NC,
DATAWORLD, INC./DBA NET- EXPRESS, Knoxville, TN,
DB TECHNOLOGY, INC., Tuscaloosa, AL,
DHR Technologies, Fort Myers, FL,
DIGITAL AGENT LLC, Atlanta, GA,
Direct Mail Express, Daytona Beach, FL,
Discount Utilities LLC, Monticello, IN,
Donobi, Inc., Bremerton, WA,
DSL Express, Coral Springs, FL,
DSL INTERNET CORPORATION, Miami, FL,
DUKE ENERGY TELECOMMUNICATIONS, Charlotte, NC,
East Tennessee Network, LLC, Greenville, TN,
GEORGIA BUSINESS NET, INC., Augusta, GA,
Go Concepts, Inc., Lebanon, OH,
Gold Coast DSL/TampaBay DSL, Inc., Tampa, FL,
Gorge Networks Inc., Hood River, OR,
Grand Central Station Internet Services, Inc., Shreveport, LA,
GULF SOUTH INTERNET SERVICES, INC., Metairie, LA,
Hayes E-Government Resources, Inc, Tallahassee, FL,
HOSTOPIA INC., Ft. Lauderdale, FL,
HUNT BROTHERS OF LOUISIANA, LLC, Franklinton, LA,
I-55 INTERNET SERVICES, INC., Hammond, LA,
I-LAND INTERNET SERVICES, Sedalia, MO,
IdeaTek Systems, Inc., Hutchinson, KS,
iMetWeb.Net, Marysville, OH,
INET SYSTEMS CORPORATION, Douglasville, GA,
INFORMATION ENGINEERING, INC., Tampa, FL,
InfoStructure, Inc., Humboldt, TN,
Innernet, Inc., Chambersburg, PA,
INSOMNIC COMPUTERS, INC., Miami, FL,
Intelligence Network Online, Clearwater, FL,
Intellistar, Maitland, FL,
Interactive Services Telecom/ISN Telecom, Miami, FL,
Interlink America, Jacksonville, FL,
InterMind Corporation, Las Vegas, NV,
Internet Business Consulting, Matthews, NC,
Internet Junction, Dunedin, FL,
Internet of Whiteville, Whiteville, NC,
ISDN-NET, INC., Nashville, TN,
KAMPUNG COMMUNICATIONS, INC./KCL.NET, Miami, FL,
Kimbanet, Martinsville, VA,
Kinex Networking Solutions, Farmville, VA,
Levin Concepts, Orlando, FL,
LEXISOFT, INC., Melbourne, FL,
LPM Micronics, LLC, New Bern, NC,
Marlowe & Associates, New Port Richey, FL,
MASON ELECTRONICS, Goldsboro, NC,
Mecklenburg Communications Services, Chase City, VA,
METANET INTERNET SOLUTIONS, INC., Greenwood, SC,
Micro-Management Systems, Dublin, GA,
Microdoctor.com, Warren, OH,
Mid Florida Internet, Ocala, FL,
MOBILE INTERNET SERVICES, Mobile, AL,
MoonStar bbs, Farmville, VA,
mpiNET, Orlando, FL,
Naples Free-Net, Naples, FL,
NEBUTEL, Melbourne, FL,
Neotek Industries, Inc/dba Structure (X), Lake Charles, LA,
Net Access Corp., Parsippany, NJ,
Net Change Consulting, Edenton, NC,
NetComm Internet Technologies, Inc, Fort Pierce, FL,
Netlink IP/Technetronics, Brunswick, GA,
NETROX LLC, Miami, FL,
Network Hardware Resale, Santa Barbara, CA,
Network Tallahassee Inc, Tallahassee, FL,
New Backroads, LLC, Laurens, SC,
NORTHEAST GEORGIA INTERNET ACCESS, INC., Athens, GA,

ECSIS.NET, LLC, Dyersburg, TN,
Emerald Coast Internet Service, LLC, Marianna, FL,
eNetx, LLC, Charlotte, NC,
ESPER SYSTEMS, Knoxville, TN,
EWOL, Englewood, FL,
FDN Communications, Inc., Maitland, FL,
FIRST COAST ONLINE, Jacksonville, FL,
Florida Phone Service, Miami, FL,
Florida Phone Systems, Inc., Gainesville, FL,
Franklinisp.net Inc., Franklin, IN,
Future Business Solutions, Inc., Altamonte Springs, FL,
Gainesville Regional Utilities, Gainesville, FL,
Gamewood, Inc., Danville, VA,
Gateway Business Solutions, Clarksville, TN,
Georgia Blue Print Company LLC, Alpharetta, GA,
Ruddata Corporation, Paducah, KY,
Sabine Communications, Leesville, LA,
Schupbach Corp., Mount Vernon, OH,
SCOUT COMMUNICATIONS, INC., Hoover1, AL,
Seimitsu /Csam.net, Savannah, GA,
Select Connect, Tupelo, MS,
Sitestar.net, Lynchburg, VA,
SNC Communications, LLC, Coral Gables, FL,
Southeastern Services, Inc./Quality Internet, MacClenny, FL,
SOUTHERN STAR, Metairie, LA,
Spiderhost, Inc., Lake Mary, FL,
STARFISH INTERNET SERVICE, Morehead City, NC.,
STRATONET, Sebring, FL,
Supernova Systems, Inc., Bluffton, IN,
SystemLink Broadband, St. Petersburg, FL,
TECH LEVEL 5, LLC, Lexington, KY,
TECINFO, LLC, Leland, MS,
TELLURIAN NETWORKS, Newton, NJ,
TERRANOVANET, INC., Key Largo, FL,
Terranovus.net, Inc., Sebring, FL,
THE HOME TOWN NETWORK, INC., Lake Placid, FL,
The Junction, Vinita, OK,
The Lynx Group, Inc., Front Royal, VA,
NORTHEAST TELECOM, LLC, Collinston, LA,
o1 Communications, Sacramento, CA,
OLTRONICS, INC., Orlando, FL,
Optivon, Inc., Orlando, FL,
Our Town Internet Service, Stephenville, TX,
Pacific Computing, LLC, Tillamook, OR,
PlanetCable, Carlisle, PA,
PowerOne Internet, LLC, Tavares, FL,
Proxyconn, Inc., Irvine, CA,
RAD-INFO, Inc., Tampa, FL,
RAPID SYSTEMS, Tampa, FL,
REA-ALP Internet Services, Alexandria, MN,
River City Online Inc, Elkin, NC,
RJIA.NET, Mt Airy, NC,
Tiger Communications, Inc., Chicago, IL,
TNWEB LLC, Lewisburg, TN,
Tphone.us, Cumming, GA,
Tri-County I-NET, Newport, PA,
TRISTAR COMMUNICATIONS, Pompano Beach, FL,
VELOCITY ONLINE, Tallahassee, FL,
Vexan Solutions Inc., Daytona Beach, FL,
VIRTUAL INTERACTIVE CENTER, Knoxville, TN,
WAN COMMUNICATIONS, INC., Miami, FL,
WaveNet, Sanford, NC,
WEBKORNER INTERNET SERVICES, Charlotte, NC,
WebNeed, Inc., Charlotte, NC,
WeBound Internet Services, St. Robert, MO,
West Central Ohio Internet Link (WCOIL), Lima, OH,
WestCoastNet, Inc., Lincoln City, OR,
Willow Creek Computer Systems, Bridgeport, TX,
WIN.NET BUSINESS INTERNET, Louisville, KY,
WISETECH, Bartlett, TN,
WORLD OF COMPUTERS OF KINSTON, INC., Kinston, NC,
WORLD RAMP, INC., Winter Park, FL,
WORLDSPICE.NET (Webnet Memphis Inc.), Memphis, TN,
Wythenet, Wytheville, VA,
Your Business Software, Inc., Natick, MA.

Together, FISPA and its members oppose BellSouth's Petition and request the Commission deny it.

I. BELLSOUTH SEEKS THE RIGHT TO BE UNREASONABLE AND DISCRIMINATORY.

BellSouth's request for forbearance should be understood for what it is – the desire for the government-sanctioned right to be unreasonable and discriminatory. What other conclusion is possible for a Petition that asks to be relieved from the fundamental obligations of common carriage?

Private carriage lacks the fundamental characteristics of common carriage. Operating in a private carriage mode, BellSouth would be under no obligation to serve a party, such as an

unaffiliated ISP, making a reasonable request for service. As a "private carrier," BellSouth could stonewall such requests by offering onerous and unconscionable rates, terms and conditions.

While it is a fundamental American right that private property may be employed by its owner according to its discretion, the exercise of that right is circumscribed by competing American values – safety, health, civil order, public need and good. Private property *is* regulated – trucks have weight limits and airplane's maintenance requirements; zoning laws limit the use of private property for everything from sites for rendering plants to the sale of liquor; protest marchers must comply with certain requirements to avoid public mayhem and manufacturing plants must adhere to environmental regulations. BellSouth's "private property" is not and should not be made immune to such standards, particularly since much of the property for which BellSouth now seeks exclusionary use was built with the aid of a government-sanctioned monopoly and a protected rate base.

BellSouth should not be allowed to use private carriage to engage in self-directed discrimination by making selective offers to preferred business partners and affiliated interests while stonewalling its "strategic competitors."

II. COMMON CARRIAGE AND *COMPUTER INQUIRY* WORK; THEY DO NOT NEED TO BE FIXED OR FOREBORN, INDEED, THEY SHOULD BE EXTENDED TO OTHER BROADBAND PLATFORMS AND ENFORCED WITH VIGOR.

While imperfect in its enforcement, the existing regulatory system governing ISP access to RBOC networks has a long history of success. FISPA posits that what is not broken need not be fixed. Indeed, the Commission should take note of the history of achievement, technological advancement, and consumer choice given life through Title II and *Computer Inquiry* rules and consider extending and enforcing these requirements on all broadband platforms and other

facilities that remain essential to deliver information content to the American consumer, regardless of geographic location or income level.

A. Private Carriage is No Substitute for Title II Common Carrier Regulation

The principles that govern the duty of common carriage are well over a century old. They require dominant firms whose service is imbued with public interest, convenience, and necessity to provide those essential services to all who have a reasonable need for and make a reasonable request for service. These duties should not be compromised because those who request and need such services are now viewed as "competitors," or, more accurately from the incumbent's viewpoint, as interlopers on their private domains. The status of the "customer" in BellSouth's eyes is not determinative of the public's interests. It is the Commission's responsibility to protect the public's interests, and these interests, it will be shown, are contrary to BellSouth's self-serving interests.

As a common carrier, BellSouth is not responsible if a customer misuses its facilities and services. Likewise, as a common carrier, BellSouth is not entitled to handicap those who request service based on its view of whether the requesting party has a right to that service if and when exercise of that right is seen as a threat to its own corporate goals. The principles of common carriage make clear that the issue is not about the carrier's interests, but the public's interest.

A public utility is regulated because its services are so important and ubiquitously required that economies of scale either warrant the grant of monopoly status or create the necessity for it. To control such power, government regulation is required to balance the competing interests of public need and right versus corporate goals and private rights. Whether the monopoly is a *natural* monopoly or one that warrants government recognition as a monopoly, the economic effect is the same - the cost of becoming another provider is

significantly greater than the incumbent's cost, making competitive entry uneconomical or competitive survival problematic, post market entry.

The private carriage sought by BellSouth lacks the fundamental and critically important characteristic of "common" carriage – the separation of carriage and content. The postal service delivers the mail. It does not create the content of what is delivered. Likewise, a communications common carrier does not create the content that is delivered by its facilities and, as importantly, does not use its control of those facilities to censor the content that is to be delivered. Once the protocol requirements of delivery are met, the payload may consist of any protocol, any message. BellSouth's proposed exclusionary approach, *i.e.*, sole control over who may use its facilities, creates a chilling effect on the speech and diversity of views that are able to reach the public.

Information service providers are not common carriers; they are providers of information. That information may be a product of their own creation and resources or it may be that of their customers. The critical concern is that the widest diversity of content not be artificially truncated by BellSouth's self-serving economic interests. The Commission should not lend its good offices to goals so clearly against the public's interest in receiving news, information and content from the broadest array of sources as possible.

The Commission is also aware that private carriage arrangements can only be effected by negotiated contracts. Contracts of adhesion, by definition, are not negotiated. The Commission is or should be aware that interconnection agreements between small CLECs and ILECs are contracts of adhesion. Such contracts have limited the ability to compete, the ability to offer competitive pricing to end users, to offer innovative services and tailored terms to meet customer need. The same result will occur here in regard to small ISP access to customers. Absent

regulatory mandates, BellSouth has no incentive to fairly negotiate private contractual arrangements with small, independent ISPs. If the Petition is granted, BellSouth will have the upper-hand and ability to force unfavorable contractual arrangements onto small ISPs. Such contracts of adhesion are contrary to public policy.

BellSouth also claims it needs to be freed from Title II common carrier obligations in order to craft more tailored services on behalf of its ISP customers, to whom it wishes to offer private carriage. This argument is disingenuous, and so blatantly fallacious that it mocks the regulatory expertise of the Commission. BellSouth's ability to tailor its offerings is in no way diminished by the presence of competitors in the marketplace. Such competition, if anything, only goads a reluctant monopolist to respond to its customer's demands, something it need not do and has not done when heretofore left unchallenged by such competitive forces.

And lastly, the fundamental concern expressed in BellSouth's Petition, that Title II regulation increases its cost of doing business, can be addressed by BellSouth itself. It does not require Commission action or forbearance. DSL lines are not subject to traditional rate regulation. The services provided by their use are defined by the service providers themselves. BellSouth is therefore free to craft as much flexibility as it chooses into its DSL offerings. It is not the flexibility in the service offerings that must be available on a nondiscriminatory or uniform basis; it is the availability of the capacity of the DSL lines themselves. Such availability is always subject to loop qualification and other tests. It defies credulity to accept BellSouth's assertion that it cannot find a way to offer sub-DS-3-rate aggregate interfaces to its ISP subscribers. If such were the case, then it has done a poor job indeed of crafting its tariffs. The truth of the matter is that all BellSouth needs to do to resolve the concerns its Petition raises is to redraft its tariffed offerings! Any number of consultants and ISPs would be happy to assist in

crafting a service definition and tariff that is both flexible and profitable and at the same time meets the needs of unaffiliated ISPs.

B. *Computer Inquiry* Makes Competition Work

BellSouth views the *Computer II* rules as an out-of date nuisance, one that simply increases its cost of doing business. The Commission should not be surprised at BellSouth's self-serving view. But *Computer II* is more than a nuisance to monopoly local exchange carriers. It is a barrier to their efforts and intrinsic intent to lessen and then eliminate diversity of choices made possible by effectively competitive markets.

Computer II is a classic example of a well-intentioned regulatory program to permit dominant entities to operate in both competitive and non-competitive markets. The ground rules are simple. To counter the advantages of dominant entities, it was necessary to establish the proverbial level playing field. This goal was to be achieved by separating competitive activities from those in which monopoly powers existed. The separation was made by defining the boundaries between LEC lower-layer (basic) services and LEC upper-layer (enhanced) services and their associated terminal equipment. This produced a clear understanding of what a "telecommunications service" was and what it was not.

This separation is recognized in the Telecommunications Act of 1996 ("the Act" or "1996 Act"). The Act's definition of "telecommunications service" largely aligns with the "basic" services of *Computer II*. Clearly, the authors of the Act did not expect to see *Computer II* boundaries eliminated. Indeed, the distinction was codified. Granting BellSouth's requested forbearance, therefore, would require the Commission to ignore the fundamental differences in the nature of the two kinds of service and override clear Congressional intent to keep separate the lower and upper layer services.

When the focus of *Computer II* on enhanced services is considered, it is clear that the rules properly delineated the boundary between regulated and unregulated activities. Given the development of the industry at that time, it is not surprising that *Computer II* had more impact on terminal equipment than upon the then still-nascent enhanced services area. The history recorded is instructive for today.

After *Carterfone* and through *Computer II*, competition in the terminal equipment sector developed, but only with great difficulty. For example, although corporations that leased PBX systems from "the phone company" now had an alternative, that alternative was an unknown – a "no name" vendor, offering unfamiliar terms of service. This phenomenon alone was seen as a risk, rather than an opportunity by many corporations. As a result, many were afraid to use an interconnect company despite the fact that their prices were lower and their offerings more innovative (as was almost always the case).

Then there was the endemic problem associated with transitioning from a monopoly market to a competitive one. Interconnect companies and their customers had to risk problems that did not arise with the incumbent monopoly's tariffed interconnect equipment. For example, trunk circuit orders related to an interconnect company's equipment had to be placed with the monopoly provider via its "special departments." A stratagem that invariably resulted in processing competitive suppliers' orders far more slowly than subscribers using incumbent-owned equipment (PBXs). Moreover, whether such "slow-rolling" existed or not in regard to a particular order, the *perception* of discrimination against interconnect companies was enough to discourage most customers from buying from interconnect vendors. These issues were resolved by *Computer II*'s detariffing terminal equipment *and* by requiring the LECs to deal at arm's-length with their unregulated subsidiaries.

Ironically, going all the way back to the MFJ, it will be recalled that its terms required that the post-divestiture entity that would take over the terminal equipment business would be a fully separated subsidiary of the divested AT&T, *not* its "Baby Bells," the RBOCs of today. The approach taken in the MFJ was followed in the Commission's *ISDN Decision*.[4] The Commission required the NT1 (Network Terminator) and ISDN line to be treated as untariffed customer premise equipment. This had a profound effect on the development of ISDN. A single line-coding standard, Reference Point U, needed to be defined: In Europe, because the demarcation was the user side of NT1 (Reference Point T), line-coding was an internal matter and thus not subject to standardization. American ISDN gear then largely grew up using the 2-wire "U interface" as the demarcation, rather than the 4-wire "S/T interface" found in most other countries.

During the mid-80s, development of ISDN standards, so-called "teleservices" were part of the Comité Consultatif International Téléphonique et Télégraphique ("CCITT" - today's ITU (International Telecommunications Union)) program of work. These were higher-layer services offered over the ISDN. *Computer II* essentially banned the RBOCs from offering teleservices as *part of* ISDN. Instead, the enhanced services, the "teleservices," were to be provided by third parties. This distinction helped lead to the development of the commercial and consumer Internet, among other things.

It is clear from this hindsight (actually, it was fairly clear at the time) that the RBOCs had *no idea* what enhanced services their subscribers really wanted. They were promoting ISDNs for Centrex telephone sets (a valid, if parochial, application), and for obsolete functions such as

[4] *In the Matter of Integrated Services Digital Networks (ISDN),* First Report, 98 F.C.C.2d 249 (1984).

integrated voice and data (dumb teletype-style) terminals for logging into local minicomputers and mainframes, similar to the failed PBX terminals of a few years earlier.

But because of *Computer II* requirements, equipment vendors and customers could adapt ISDN for their own needs, such as videoconferencing, bulletin board file transfer, telecommuting (remote LAN access), leased-line backup, and, of course, Internet access. These were not bound to CCITT-standard "teleservice" descriptions. They were innovations that were made possible by *Computer II*.

To this extent *Computer II* mirrored the common carrier obligation that ILECs, as carriers, would not be allowed to meddle with the payload of their subscribers' calls. Nevertheless, the RBOCs did succeed in effectively killing off the ISDN Basic Rate Interface in the American market. However, they did not succeed in killing off the development of a singular piece of equipment that allowed some competition to prevail in the reemerging anti-competitive environment – the modem. Between the time of *Computer II*'s issuance and the late 1990s, free from the impediments toward innovation that the RBOCs may have imposed, modem capacity increased from 2400 bits per second to 53.3 kilobits per second. This is another example of the principles of common carriage at work. The independent modem manufacturers discovered that the actual behavior of the payload was usually better than the specified behavior. *Computer II,* in that sense, did not create the opportunity for innovation, but it put teeth into the nondiscrimination requirements of common carriage – the necessary underpinning of all innovation in modern enhanced services.

It is recognized that today's ubiquitous Internet grew out of government-funded research networks, ARPAnet and NSFnet, and were not open to public access and use. During the 1980s, an increasing number of institutions and corporations gained access to the Internet backbone, but

the Acceptable Use Policy (AUP) limited commercialization. In the early 1990s, the backbone was privatized and the AUP no longer applied, opening the floodgates to a vast number of new providers. An industry structure rapidly developed in which three distinct roles emerged under the "ISP" banner:

- **Backbone** ISPs ("IBSPs") are the long-haul providers, dealing at the wholesale level, purchasing bulk intercity pipes and selling service to large organizations and other ISPs. Since there was no dominant player, (or the dominant players were asleep at the switch because what was developing was innovative and hence invisible to their monopoly focus of preserving and exploiting their local monopolies), a free-market system of "peering", "transit", and "upstream" interconnection developed.

- **Vertical** ISPs ("IVSPs") include the retail providers, purchasing service from IBSPs and providing vertical services to their customers. Still other IVSPs provide services such as web hosting.

- **Access** ISPs (IASPs) evolved to intermediate between the IVSPs and the local exchange carriers. They provide "rent-a-modem" service, or in occasional cases offer self-provisioned bandwidth via available media.

All of these developments evolved *without* the involvement of the ILECs. Indeed, given their narrow focus of preserving and exploiting their monopolies, the ILECs managed to be among the last in the industry to become aware of the growth of the Internet. Thousands of ISPs (specifically IVSPs) were in business all over the country before the major ILECs had their own offerings.

Thanks to *Computer II*, the ILECs could not discriminate against independent ISPs in the provision of dial-up service. Later, they also had to provide DSL to independent ISPs. It is hard to imagine this industry having developed as it did without the strictest application of the protections afforded by *Computer II* and the principles of reasonableness and nondiscrimination embodied in Title II. Relaxing or eliminating these protections, as requested by BellSouth and others, will result in the taking of what has been created by many independent and innovative

minds and surrendering it to dull and self-interested entities that have long established their disregard for fair competition.

The Commission cannot now turn its back on the long history of success, progress and pro-competitive results of the *Computer Inquiry* line of decisions.

C. The Internet Thrives Because Existing Regulations Require Openness of the ILEC's Networks.

BellSouth submits that continued regulation pursuant to Title II and *Computer Inquiry* rules will inhibit broadband innovation and deployment to the detriment of consumers. These arguments are misguided and disavowed by experience. The 35-year history of the "information" and "enhanced" services industries proves time and again that innovation and deployment of advanced technologies actually depends on a continuation of the Commission's practice of applying regulation targeted to service layers that are not competitive (the lower, access transmission services) and not applying, or lightly applying, regulations to layers where competition exists (the higher, application and content layers).[5]

Before the *Computer Inquiry* rules, RBOCs were able to control many ISP functions by bundling their own ISP services with their telephone network infrastructure. The *Computer Inquiries* changed this by mandating that the infrastructure companies offer a selection of information service providers to their customers. The RBOCs were later forbidden to use their infrastructure positions to give affiliated ISPs an advantage over competing ISPs. This openly competitive environment spurred to market numerous ISPs, who, in turn, stimulated the development of the World Wide Web and commercial Internet.

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[5] Robert Cannon, Senior Counsel, Office of Plans and Policy, Federal Communications Commission, *Where Internet Service Providers and Telephone Companies Compete: A Guide to the Computer Inquiries, Enhanced Service Providers and Information Service Providers*, Version 0.0, http://www.tprc.org/abstracts00/ISPcompetepap.doc

It is small business that drives innovation in the American economy, not large monolithic businesses that wish to dominate the marketplace to profit from a "one-size-fits-all" approach to providing services. The Internet was brought to the public by small, independent ISPs. The telephone companies not only did not support this paradigm shifting development; they fought it. Only after the Internet was firmly ensconced in American life did BellSouth and its large ILEC brethren begin to see it as a business opportunity. In short, the ILEC-based ISPs have never been innovators.[6] What would make the Commission turn a blind eye to this irrefutable fact or cause the Commission to retreat from a regulatory system that is a demonstrable success? Certainly, BellSouth's Petition cannot.

The Internet thrives and broadband technology is deployed because the underlying transmission networks and standards are and have been open to competitive pressures that stimulate network providers, like BellSouth, to innovate. This "openness" is a result of Title II and *Computer Inquiry* regulations. The *Computer Inquiry* regime created the right conditions for a robustly flourishing competitive market for enhanced services, one which eventually evolved to include competitive ISPs. These rules are necessary for the continued proliferation of ISPs. An unregulated duopoly environment (Telco/CableCo), on the other hand, necessarily limits BellSouth's incentive to aggressively compete and innovate. A pro-competitive regime, safeguarded by Title II and *Computer Inquiry* rules, ensures small ISPs access to the ILEC's lines and provides the better means for entrepreneurial innovation. Forbearance would provide BellSouth the opportunity to "close" its network to unaffiliated ISPs and discriminate among and

[6] ADSL itself had been essentially abandoned by the ILECs after failed video-on-demand trials in the early 1990s. The independent ISPs were responsible for using ADSL for data. It was the independent ISPs that developed a free-market system of intercarrier compensation based on peering and upstreaming. ISPs developed consumer-friendly web page creation services. ISPs are learning how to develop and deal with Voice over IP, a future service that does not pose a competitive threat to them as it does to the ILECs. ISPs, especially the smaller local ones, have been continuously innovating in their networks; the Bell affiliates are more than content to offer "me too" services leveraged to their monopoly loop services.

between the great diversity of services offered by the multitude of independent ISPs. This result is contrary to the open architecture of the Internet, and, as will be shown, *infra*, Section 10 of the Telecom Act.

BellSouth's Petition attempts to undermine over three decades of pro-competition policy and literally put the independent ISP industry out of business. While the removal of Title II and *Computer Inquiry* obligations would, indeed, slightly reduce a monopoly's cost of doing business,[7] it would be no more appropriate than permitting the ILECs to ban "foreign attachments" to their telephone lines, as they argued against in the *Carterfone* decision which presaged *Computer Inquiry*.

BellSouth's Petition makes much of the competitive entry envisioned by the 1996 Act, but the 1996 Act, itself, has failed. Its intent was sound, but its implementation was made impossible by the very entities that now seek further eradication of its pro-competitive and public protection provisions. A balance must be struck. A few legacy carriers cannot continue to benefit from valuable government grants and licenses, including the use of public rights-of-way, and be allowed to extend those rights in a way that bars others from offering their service to the public. In the future, broadband services will be as, or more, important than Plain Old Telephone Service ("POTS"). Limiting the common carriage obligations of reasonableness and non-discrimination to declining services such as POTS does violence to the entire principle that the Commission is charged with assuring. That is, "to make available, so far as possible, to all the people of the United States, without discrimination… communication service with adequate facilities at reasonable charges…" as Congress so wisely provided 70 years ago. 47 U.S.C. § 151.

[7] BellSouth puts the price tag on this savings at $3.50, but BellSouth's Petition is short on support for this claim.

III. FORBEARANCE PRESENTS A CLEAR AND PRESENT DANGER TO INNOVATION, CONSUMER CHOICE, AND TAILORED SERVICES

Forbearance presents a clear and present danger that DSL-based ISP service will be offered by the long entrenched local exchange monopolisps and the public's current right and capability to choose ISPs based their unique needs and the independent ISPs differentiated services will be sacrificed. Entities that have not been born, bred and matured as a monopoly, of necessity, have had to innovate and create service distinctions that appeal to various niche markets – first, in order to establish a market and, then, to sustain their presence in that market. The independent ISP's business plan seeks not to be the choice for every potential user, but to be an attractive choice to users that may most benefit from its unique services. Forbearance will quickly convert a market of diverse choices into an anachronistic throw back to the days of homogenized, non-differentiated, totalitarian–like services, such as those available in countries that do not value and support free enterprise and free speech, that do not tear down entry barriers, but erect them, that do not allow choice but require purchase of services from a state-controlled entity. Although for different reasons and in different ways, the same smothering atmosphere will be created – not with control directly in government hands, but in the hands of private interests created over decades of sanctioned monopoly and perpetuated by government decision. What will be sacrificed is differentiation and choice created and offered by independent ISPs.

- ***Service Differentiation - Content Filtering***

One area of service differentiation involves content filtering. Today, this usually consists of two very different types of service. One, often thought of as "family-friendly" filtering, intentionally blocks access to services believed to be unsuitable to some classes of viewer. Courts have ruled that this cannot be mandated of an ISP, but there are ISPs and FISPA

members, especially focused in certain geographic regions, that choose to offer this because of their constituencies.

Another type of filtering is anti-spam defense. Here, there are several approaches at work. It is not always easy for a machine to tell spam from valid email. Some ISPs leave all filtering to the end user. Others block mail that fails some kind of protocol or other test. For example, there is currently a debate in the protocol community around Sender Policy Framework (SPF) and competing methods of distinguishing forged email. Some ISPs choose block lists from among the many blacklist services now available. These services are not 100% reliable, so ISPs have to choose which ones they find most useful, and implement blocking policies. Some ISPs use rule-based filters such as SpamAssassin. Some use Bayesian filtering of the content. Some use human-mediated spam block services, such as Brightmail, which have rapidly-updated active spam filters that block specific spam messages before they are widespread. And for each of these anti-spam techniques, the ISP chooses whether to block the mail entirely, move it to a special mailbox that the user can choose to query to search for the occasional false positive, or merely label the message as questionable so that the user can filter it. An ISP monopoly unconstrained by Title II and *Computer Inquiry* rules can destroy these variations and the public will be the loser.

- ***Service Differentiation - Symmetry vs. Asymmetry of Bandwidth***

Consumer DSL services are almost always provisioned using *Asymmetric* DSL technology. This usually works well because consumer demand tends to be much greater in the download than upload direction. Business subscriber requirements tend to be far more symmetrical. Existing DSL tariffs generally permit the ISP to choose between different speed packages, allowing for a variety of upstream and downstream bandwidth offerings.

RBOC-affiliated ISPs tend to be most parsimonious in the upstream direction. BellSouth, for instance, claims in its Petition that its own market share of true Broadband service (defined by exceeding 200 kbps in *both* directions) is particularly small because its basic consumer ADSL service has only 128 kbps upstream capacity. This does not, as BellSouth implies, mean that BellSouth's market power is weak. Rather, it proves the opposite, that BellSouth's market power is great enough that it can provide an inferior upstream service *by its own choice*.

ADSL technology is capable of being less asymmetric. Some ISPs use ILEC ADSL services with the upstream and downstream bandwidth both set to 640 kbps. This is near the maximum upstream and minimum downstream rate, but it provides a business-class symmetric service using inexpensive ADSL equipment. The cost of this to the underlying ILEC is essentially the same as for a more asymmetric service; the choice is made at the ISP layer, not the telecommunications service layer.[8] This choice would be lost under BellSouth's requested forbearance.

- ***Service Differentiation - Vertical Services***

Retail ISPs provide a number of "vertical" services in addition to raw Internet access. These are also differentiators. America Online, for instance, sells a "bring your own" service that provides no access, merely permission to use its vertical services. But most subscribers pick an ISP that provides a bundle of access and vertical services. The most familiar vertical service is probably email. This has many differentiators other than the aforementioned spam filtering. Email, in turn, has two functions: relaying (used for sending) and servers. The relaying function of most ISPs is straightforward, allowing users of their networks to send email anywhere via

[8] The maximum downstream rate for ADSL is 8 meg, the maximum upstream for ADSL is 1 meg. Some ISPs use a combination of asymmetric upstream and downstream to offer a more symmetric offering, suitable for business. For example, an ILEC's 768Kbps x 512Kbps ADSL offering can be used to create a 512x512Kbps symmetric service offering.

their server. There are, however, subtle differences. The Internet's mail protocol, SMTP, uses port 25. As an anti-spam measure, some ISPs block port 25 sent from the user to anyone but the ISP server. This prevents virus-hijacked machines from becoming bulk senders. But it also prevents users from sending mail directly, as some choose to do. A few ISPs permit port 25 SMTP sending but cap the volume, which allows typical users' email to flow, but blocks the torrent caused by a virus.

Verizon Online, however, instituted a policy by which its users are required to put Verizon's domain name in the header of their message, instead of the name of their chosen email address (which, of course, could be a private domain or a different service). This *mandatory advertising* policy is incompatible with many users' preferred mode of operation, but is nonetheless imposed on Verizon's DSL subscribers.

Email receiving options are also varied. Retail ISPs provide an email server that stores incoming emails until fetched. These do not all behave the same. They have different storage capacity quotas, blocking emails once the quota is full. Most support POP3, a simple protocol that allows retrieval of email by a client. A few ISPs support IMAP4, a more elaborate protocol that allows manipulation of the email on the server, and allows email to remain on the server while being filed by a mailbox or selectively retrieved. Some ISP POP3 servers support an option that allows email to be selectively retrieved by multiple clients (say, a user's desktop and laptop computers) while retaining knowledge that it has or has not been already retrieved once. Some encrypt passwords in transit; some do not. Many, but not all, offer web-based access as well. Many offer more than one mailbox per account, especially suitable for families; some only offer one.

Independent ISPs also offer additional services such as personal web pages. Web services vary in terms of storage capacity, usage quota, page creation support and available features (Common Gateway Interface or Active Server Page support, PHP programming, etc.). Some broadband ISPs also offer dial-up support for travel, with or without a quota of "free" hours. Some provide help with virus removal; others bundle it in software. Some support only Microsoft Windows users; some provide support for Apple Macintosh and Linux users.

What becomes of this clearly beneficial diversity if the Commission grants BellSouth's Petition? Homogeneity in information services and technology benefits no one but the dominant provider of both content and transmission. The Commission must not grant BellSouth the opportunity to squelch the diversity in options driven by independent ISPs – but that is exactly what BellSouth is asking the Commission for authority to do.

- ***Service Differentiation - Servers and Tunnels***

Independent ISPs often prohibit residential retail customers from having "servers" on their lines. This is widely done to prevent subscriber web servers from overloading the upstream direction; cable modem networks are especially limited in the upstream direction. But just how this is interpreted does vary from ISP to ISP. Some have policies against using secure tunneling protocols, such as IPsec. Some allow private email servers, some do not. Again, this is the type of issue that is best handled in a vibrant, competitive market with many players. These issues do not impact the underlying telecommunications layer, only the higher layers serviced by independent ISPs.

The "layered" approach to regulatory policies, as supported by FISPA and favored by the vast majority of non-ILEC commenters in the WC Docket No. 02-33 rulemaking proceeding is fully compatible with this approach. Forbearance is not.

The preceding Sections demonstrate that the current regulatory system has worked, continues to work, and has resulted in immeasurable benefits and abundant choice to the American consumer. BellSouth's Petition creates a clear and present danger to these achievements and threatens continued diversity, tailoring of services, and customer choice made possible by independent ISPs. What's more, as will be shown in the following Sections, BellSouth's Petition is legally deficient. For all these reasons, the Petition must be denied.

IV. BELLSOUTH'S PETITION DOES NOT SATISFY ANY OF THE SECTION 10(a) FORBEARANCE CRITERIA; IT MUST BE DENIED

The Commission may not grant BellSouth's request for forbearance unless it is convinced that BellSouth has satisfied the explicit forbearance requirements set forth in section 10(a) of the Communications Act. In particular, BellSouth must demonstrate that the *Computer Inquiry* and Title II common-carriage requirements: (1) are not necessary to ensure that the charges and practices for broadband[9] services "are just and reasonable and are not unjustly or unreasonably discriminatory;" (2) are not necessary "for the protection of consumers;" and (3) are not necessary to protect the public interest,[10] and, in particular, that such non-enforcement will "promote competitive market conditions" and "enhance competition among providers of telecommunications services."[11] If "any one of the three prongs is unsatisfied" the Commission must deny BellSouth's Petition.[12]

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[9] For the purposes of these Comments, FISPA adopts BellSouth's definition of "Broadband" as defined in its Petition. Namely, the "technologies that are capable of providing 200 Kbps in both directions. These services include high-speed Internet access provided using DSL technology." *See* Petition at n. 2.

[10] 47 U.S.C. § 160(a).

[11] 47 U.S.C. §160(b).

[12] *CTIA v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003); The Commission "cannot forbear in the absence of a record that will permit [it] to determine that each of the tests set forth in Section 10 is satisfied for a specific statutory or regulatory provision;" *In the Matter of Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, First Report and Order, 15 FCC Rcd. 17414, ¶ 13 (2000) ("*Fixed Wireless Forbearance Order"*) (internal citations omitted); *see also, In the Matter of Amendment of the Commission's Rules Concerning Maritime Communications*, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd. 19853, ¶ 55 (1998) (request for forbearance from Title II common carrier obligations "cannot be granted

In considering BellSouth's Petition, the Commission must adhere to the principle that "[t]he decision to forbear from enforcing statutes or regulations is not a simple decision, and must be based upon a record that contains more than broad, unsupported allegations of why the statutory criteria are met."[13] Because these criteria focus on competition and consumer protection, both the Commission and the courts have recognized that the Commission must examine detailed evidence concerning the markets for the specific services at issue. In particular, a request that seeks "the forbearance of dominant carrier regulation under Section 10" demands "a painstaking analysis of market conditions" supported by empirical evidence.[14] The Commission cannot simply "assume that, absent the regulation at issue, market conditions or any other factor will adequately ensure that charges … are just and reasonable and are not unjustly or unreasonably discriminatory."[15] There must be hard market data that unequivocally supports the drastic result of forbearance.[16] Section 10(a) analysis cannot be applied in the abstract, but must focus on the specific market conditions existing with respect to the regulations and service at issue.

As set forth below, BellSouth does not provide the required factual and legal basis for forbearance and thus fails to meet the statutory requirements of Section 10.

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because it is too vague, both as to the specific provisions from which we should forbear from enforcing, and as to why forbearance would be in the public interest").

[13] *PCIA's Broadband PCS Alliance's Petition for Forbearance for Broadband Personal Communications Services,*Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, ¶ 113 (1998).

[14] *WorldCom, Inc. v. FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001); *AT&T Corp. v. FCC*, 236 F.3d 729, 735-37 (D.C. Cir. 2001).

[15] Report and Order, Fifth Memorandum Opinion and Order, *1998 Biennial Regulatory Review – Review of ARMIS Reporting Requirements,* 14 FCC Rcd. 11443, ¶ 32 (1999).

[16] *See Petition of US West Communications, Inc. For Forbearance from Regulation as a Dominant Carrier in Phoenix, Arizona MSA,* Memorandum Opinion and Order, 14 FCC Rcd. 19947 ¶ 25 (1999) ("*Special Access Forbearance Order"), reversed and remanded on other grounds, AT&T v. FCC*, 236 F.3d 729 (D.C.Cir. 2001). *Fixed Wireless Forbearance Order*, (the Commission rejected forbearance because "[t]he BOC petitioners must provide more than just general conclusions about market conditions so that interested parties have a meaningful opportunity to refute, and this Commission has a meaningful opportunity to evaluate, the BOC petitioners' claims."

A. BELLSOUTH DOES NOT SHOW THAT, ABSENT REGULATION, ITS RATES WILL BE "JUST AND REASONABLE" AND IT WILL NOT ENGAGE IN "UNREASONABLE AND DISCRIMINATORY" PRACTICES.

In order to satisfy the first prong of the three-part forbearance analysis, BellSouth must make a *prima facie* showing that sufficient competition exists so that application of the *Computer Inquiry* and Title II rules are not necessary to ensure that BellSouth's rates and practices for the broadband services are just, reasonable, and not unreasonably discriminatory.[17]

The Commission has never granted a carrier forbearance from Sections 201 and 202 of the Act and it should not do so here.[18] The Petition lacks any assurance of just and reasonable rates and does not explain how unjust and unreasonable discrimination against independent ISPs will not occur. BellSouth's Petition relies on broad, unsupported claims regarding the status of competition in the broadband market. However, determining whether incumbent LECs continue to possess market power over access is a highly fact-specific inquiry.[19] BellSouth has not adequately shown that existing marketplace forces are sufficient to constrain its market power and ensure that rates and practices are just, reasonable, and not unreasonably discriminatory. Therefore, BellSouth's Petition fails to meet its burden of providing sufficient evidence to satisfy section 10(a).

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[17] *Special Access Forbearance Order* ¶ 32.

[18] Even with the existence of the seemingly competitive wireless market, the Commission has consistently denied requests for forbearance from §§ 201 and 202 obligations. *See e.g., In the Matter of Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services,* Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd. 16857, ¶ 23 (Commission denies request for forbearance from §§ 201 and 202 even "[a]ssuming all relevant product and geographic markets become substantially competitive" because "carriers may still be able to treat some customers in an unjust, unreasonable, or discriminatory manner").

[19] *See e.g., AT&T Corp. v. FCC*, 236 F.3d 729, 735-37 (D.C. Cir. 2001); Report and Order, Fifth Memorandum Opinion and Order, *1998Biennial Regulatory Review – Review of ARMIS Reporting Requirements,* 14 FCC Rcd. 11443 (1999); *WorldCom, Inc. v. FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001).

1. Regulation is Needed to Ensure BellSouth Does Not Use its Market Power to Undermine Competition.

The implementation of the *Computer Inquiry* rules were necessary to provide some form of equity to competitors entering a market dominated by providers whose network was built by the public. These requirements were based further on the fact that the ILECs are both competitor and supplier and are therefore required to prevent anti-competitive practices such as cross-subsidization, price squeezes, predatory pricing and practices.

The ILEC networks are the only monopoly networks created and sustained by public rate payers and regulatory policy that ensures profitability. The *Computer Inquiry* rules were needed and continue to be needed to avoid the resulting distortions to the marketplace that will be created as a result of the Commission allowing the ILECs to erect barriers to market entry and thereby deny consumer choices and options for broadband services.

BellSouth's Petition fatally ignores the principles of a layered-based approach to Internet regulation. Under such an approach, power should be assessed separately for each layer and a company with market power in a lower layer (*e.g., BellSouth*) should be prohibited from leveraging that power to harm competition in markets that involve upper layers (*e.g., ISPs)*. It is undeniable that BellSouth has market power in the physical (lower) layer of the IP-based networks. Consequently, the Commission must safeguard against the potential of BellSouth using this lower layer power as leverage to harm competition in one of the higher layers (*e.g.* application or content layers). If BellSouth succeeds in doing away with the safeguards of *Computer Inquiry* and Title II, the "just, reasonable and nondiscriminatory rates and terms of service" that exist today will not remain nor can they.

The rates and terms of service in today's marketplace are based on all the competitors that actively participate in that market. Their elimination will cause a diminution in consumer

choice and narrow, if not eliminate, the array of rates and terms of service that exist today because of the diversity of the competitive participants. Therefore, economic regulation is necessary to restrain BellSouth from exercising its market power to undermine competition.

2. BellSouth and Cable are Equal Partners in the Broadband Duopoly.

Despite its cries to the contrary, BellSouth has market power, a lot of market power. Namely, BellSouth controls last-mile transmission facilities used to provide DSL service which small ISPs rely on to connect end users to the Internet, as well as to provide IP-based content and applications.[20] Indeed, statistics show that in the broadband marketplace, the incumbent LECs enjoy market power as either the monopoly or duopoly provider.[21] Thus, the fact the cable companies have slightly more market power than ILECs does not equate to the ILECs "lacking" market power. Nor does it justify abandonment of the current regulatory framework.

A recent study by the Leichtman Research Group shows that ILEC ADSL added subscribers actually exceeded net adds for cable for the First Quarter of 2004.[22] Additional evidence from the Pew Internet and American Life Project confirms that "DSL now has a 42% share of the home broadband market" compared with cable's 54% share.[23] According to the latest data produced by industry analyst Point Topic, DSL gained 3.2 million new subscribers in the third quarter of 2004, to reach a total of 12.6 million DSL-enabled phone lines, raising DSL's

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[20] ILECs provision approximately 92% of all loops and receive approximately 88% of all revenues of local service providers in the US. *FCC Statistics of Communications Common Carriers*, Table 5.1 – Total USF Loops for all Local Exchange Companies; Table 5.13 – Gross Revenues Reported by Type of Carrier (rel. March 2, 2004).

[21] As of June 30, 2003, ADSL and cable accounted for 91.0% of all high-speed lines in the U.S. and accounted for 97.3% of all high speed lines in the residential and small business market. Of those ADSL lines, incumbent LECs have a 94.6% market share and CLECs have only 5.4%. *FCC High Speed Services for Internet Access: Status as of June 30, 2003,* Table 1, Table 3 and Table 5.

[22] "A Record 2.3 Million Add Broadband in First Quarter of 2004," Leichtman Research Group Press Release (May 11, 2004).

[23] Pew Internet Project Data Memo, at 2 (April 2004): *see* http://pewinternet.org/reports.asp?Report=120&Section=ReportLevel1&Field=Level1ID&ID=505

broadband market share by 3.8%.[24] In another report released by Jupiter Research, it is estimated that by 2008 the United States should have a 50% broadband penetration, in which DSL will narrow the 2-to-1 adoption gap, reaching more than 20%, compared to cable modem's nearly 25% share. Jupiter figured DSL lines accounted for 6.7 % of total U.S. Internet accessibility in 2003, with cable modem representing 14.4 percent. The divide narrows incrementally until it finally reaches just over 4.5% points in 2008.[25] According to the FCC, in some markets, incumbent LEC's ADSL leads cable in the market share.[26] The Pew Study further reveals that all other providers, including fixed-satellite and wireless, captured just 3% of the market.[27] Moreover, in line with the FCC data, 17% of consumers are served by just one last mile broadband provider. What these statistics indicate is that incumbent LECs, such as BellSouth, are now nearing equal partners with cable in the broadband market share.

3. Cable Offers Essentially No Competition in the Market For Broadband Transmission Sold to Small Independent ISPs.

As the above statistics show, currently, there are two primary methods competing to provide broadband Internet access, DSL offered by the incumbent LECs and the Internet-over-cable technology, offered by the cable television industry. However, as BellSouth repeatedly points out, the two industries operate under very different conditions due to the 1996 Act which required the local telecom monopolies to open their infrastructures to competition. To date, no such directives have been given to the cable industry. As a result, not bound by the requirements of Sections 201 and 202, the cable industry has refused to open their lines to or partner with

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[24] Report found at www.point-topic.com; *see also*, http://blog.tmcnet.com/blog/tom-keating/voip/voip-blog/dsl-statistics.asp

[25] DSL Leads Globally – US Gap Narrowing - *The global broadband connection of choice is expected to catch up to the cable modem in the U.S.,* Robyn Greenspan, CyberAtlas (November 23, 2003), found at http://isp-planet.com/research/2003/dsl_031126.html

[26] The FCC's statistics show that in California, ADSL has 49.6% and cable has 40.4% of the broadband market. *FCC High Speed Services for Internet Access: Status as of June 30, 2003,* Table 7 – High Speed Lines by Technology as of June 30, 2003 (rel. Dec. 2003).

[27] *See* Pew Internet Project Data Memo.

small independent ISPs. *E.g.*, LexiSoft Declaration at ¶ 7 (explaining that the company "explored providing broadband ISP services through … CableCo … offering ISP services in our market. Our request for access to the CableCo's platform was completely ignored); CSSLA Declaration at ¶7 ("Our company explored providing broadband ISP services through Time Warner and Charter, the two CableCos offering ISP service in our market. Our company initiated negotiations with these CableCos and negotiations went nowhere. Both CableCos flat out refused to allow us access to their platforms."); SiteStar Declaration at ¶7 ("Our company explored providing broadband ISP services through Adelphia, the predominant CableCo serving our market. We received no cooperation from Adelphia and negotiations were not fruitful. Adelphia completely ignored our company's request for access."); WebKorner Declaration at ¶ 7 ("Our company explored providing broadband ISP services through Time Warner, the CableCo offering ISP service in our market. Our request for access to Time Warner's platform was ignored."); BluegrassNet Declaration at ¶ 28 ("The cable company does not allow BluegrassNet access to their transport component."); Kinex Declaration at ¶ 7 ("Our company explored providing broadband ISP services through Charter, the CableCo offering ISP service in our market. Our company initiated negotiations with Charter sales personnel and these negotiations went nowhere. Charter absolutely refused to allow our company any access to its platform."); Bayou Declaration at ¶7 ("Our company explored providing broadband ISP services through Time Warner, the CableCo offering ISP services in our market. Our company initiated negotiations with Time Warner … [the] request for access to Time Warner's platform services … went nowhere."); GoldCoast Declaration at ¶ 7 ("Our company explored providing broadband ISP services through Time Warner, the CableCo offering ISP services in our market. Our company initiated negotiations with Time Warner shortly after the company merged with AOL.

Our request for access to Time Warner's platform was met with the following response: AOL/Time Warner is only interested in allowing 1 regional ISP and 1 national ISP access to its platform to satisfy the FCC's requirements, we have met these requirements and we are not interested in any more inquiries from independent ISPs."); ECSIS Declaration at ¶ 7 ("Our company explored providing broadband ISP services through CableOne, the CableCo offering ISP services in our market. Our company initiated negotiations with the [sic] CableOne and these negotiations went nowhere. CableOne absolutely refused to allow our company any access to its platform."); COL Declaration at ¶ 7 ("Our company explored providing broadband ISP services through Time Warner, the CableCo offering ISP services in our market. Our company initiated negotiations with Time Warner and these negotiations went nowhere. Time Warner never so much as responded to our request for access to its platform."); Supernova Declaration at ¶ 7 ("Our company explored providing broadband ISP services through the CableCo offering ISP services in our market. Our company initiated negotiations with the CableCo and these negotiations went nowhere. The CableCo summarily rejected our request for access to its platform."); Acceleration Declaration at ¶ 7 ("Our company explored providing broadband ISP services through Cox Communications, the CableCo offering ISP service in our market. But no progress has been made towards obtaining access to Cox's platform. According to Cox and due to "technical limitations", only resale of their retail product was made available to us and with very thin margins. In other words, Cox would not agree to provide access to their infrastucture as part of an interconnection agreement. They only wanted us to sell their retail product for them, and in essence, become sales agents for them.").

BellSouth seizes on the status of cable systems and cites in its Petition the fact that cable companies, their broadband "competitors," are not subject to *Computer Inquiry* and common

carriage obligations. BellSouth complains that this is not "fair" or a "level playing field". This is a fallacious argument. The cable and telephone industries are very different, with a different history, different capital structure, different network architectures, and, for better or for worse, subject to different laws. While many ISPs would no doubt like "equal access" to cable modem networks, it is even more important that they retain the access that they now have to the ILEC networks. *See* BluegrassNet Declaration at ¶ 23 (stating that it "considers the 'telephone system' to be its primary and in most instances exclusive means to get broadband information to its customers."); WebKorner Declaration at ¶10 ("Bottom line is that in the markets we serve, there are no alternatives to BellSouth."); Bayou Declaration at ¶ 10 ("Bottom line is that, in the markets we serve, there are no alternatives to BellSouth."); GoldCoast Declaration at ¶ 10 ("Bottom line is that, in the markets we serve, there are no alternatives to BellSouth.").

The ILEC position is reminiscent of a comedy routine[28] in which a faith healer was visited on stage by a man who had one deformed hand. The healer repeatedly inveighed, "Lord, will you *please* make this one hand like the other!" Then the subject looked at his hands, and the faith healer looked at them and cried out, "Wrong hand!"

Telephone companies should not be turned into cable companies. BellSouth certainly likes to cite the alleged similarities of the two networks. When ISPs began asking for cable modems to be opened up, some may have cited the obligations that had always applied to telephone companies. But the cable companies did not build their networks based on the guaranteed profits of a regulated monopoly that has existed and been filling the coffers of the ILECs for nearly a century and a half. Cable companies' profits have not benefited from rate-of-return regulation. Cable companies have never been totally free from competitive alternatives

[28] Jack Burns and Avery Schreiber, *The Faith Healer – The Immobile Thumb*, from the album *The New Emerging Bigot.*

such as over the air broadcasting and multichannel satellite services. For the first decades of the cable industry's existence its market penetration never exceeded 40-50% versus the typical 96% penetration of the phone industry. Given the success of cable today, it is fair to question whether cable should be immune from open access requirements. The questions surrounding the proper role of cable for the future is not a reasoned basis to allow the ILECs to foreclose the markets, in which they are dominant, to competitive and diverse providers.[29]

Cable modem networks were developed by companies whose primary business was entertainment. They saw the Internet taking away eyeballs from television and saw themselves as able to provide a competitive Internet service. Assuming that the Commission's position in the pending *Brand X*[30] case prevails at the U.S. Supreme Court, cable modem services can be easily described as self-provisioned ISPs. That is, 180 degrees different from the model that the telecommunications industry has long used, in which they provisioned the bandwidth for any type of user. Closing off ILEC DSL networks because they do something that self-provisioned ISPs can do is an abrogation of the Commission's responsibility to the public and contrary to the dictates of the 1996 Act.

Another reason that cable modems do not offer common carriage to any ISP is because their networks are not designed for it. The standard for cable modems, DOCSIS (Data Over Cable Service Interface Specification), was created for CableLabs during the 1990s at a time when there was no pressure to create a common carrier-like service. Instead, the model was more like that of a Local Area Network. DOCSIS makes use of an arbitration procedure for its

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[29] Likewise, satellite is *not* an equivalent competitor for Internet access – not only is upstream bandwidth far more costly, but satellite transit latencies are harmful to interactive Internet activity. *E.g.,* LexiSoft Declaration at ¶ 7; SiteStar Declaration at ¶ 8; WebKorner Declaration at ¶ 8; BluegrassNet Declaration at ¶¶ 24-27; Bayou Declaration at ¶ 8; GoldCoast Declaration at ¶ 8; COL Networks Declaration at ¶ 8; Mecklenburg Communications Declaration at ¶ 7; WCK at ¶ 7.

[30] *Brand X Internet Services v. FCC,* 345 F.3d 1120 (9th Cir. 2003), *cert. granted,* __ U.S. __, 2004 WL 2153536 (Dec. 3, 2004).

limited upstream bandwidth, and while it has a reserved-bandwidth mechanism primarily of interest to cable telephony, it lacks the flexibility in data-bandwidth allocation found in ATM-based DSL networks. This does not mean that DOCSIS cannot be used for an IASP service that supports multiple IVSPs. It can; some cable companies do offer access to alternative ISPs. But the specific means of doing so are not well established or standardized, and the cable companies doing so typically only invite a small number of alternative ISPs onto their cable. This stands in marked contrast to DSL, which was designed from the ground up for common carriage, and whose ATM layer permits an essentially unlimited number of ISPs to share a DSLAM with minimal interaction.

Consequently, at this time, the existence of cable is irrelevant to the independent ISPs. Cable is not an available alternative and therefore offers no competition in the market for broadband services sold to small ISPs.[31]

4. A Duopoly with Cable Does Not Provide Sufficient Price Discipline.

BellSouth further argues that regulation is unnecessary because the "competitive broadband market" will ensure just, reasonable and nondiscriminatory rates and terms for ILEC broadband services. This simply is not true. A duopoly partnership such as that of the ILECs and cable companies does not provide the sufficient price discipline like one that results from a robustly competitive market. "In a duopoly, … supracompetitive pricing at monopolistic levels is a danger."[32] Indeed, the independent ISPs are already experiencing anti-competitive marketplace practices by their ILEC wholesaler/competitor. *See* Computer Office Solutions Declaration at ¶¶ 9- 11 ("Our company has also experienced anti-competitive marketplace

[31] *See* LexiSoft Declaration at ¶ 7; CSSLA Declaration at ¶7; SiteStar Declaration at ¶7; WebKorner Declaration at ¶ 7; BluegrassNet Declaration at ¶ 28; Kinex Declaration at ¶ 7; Bayou Declaration at ¶7; GoldCoast Declaration at ¶ 7; ECSIS Declaration at ¶ 7; COL Declaration at ¶ 7; Supernova Declaration at ¶ 7.
[32] *FTC v. H.J. Heintz*, 246 F.3d 708, 724 (D.C. Cir. 2001).

pricing by our ILEC wholesaler/competitor. BellSouth's aggressive discounts from the retail prices, purchase of bundled service and long term contracts (3 years) allows for very little differential between these discounted prices and our company's wholesale costs. As such, BellSouth's pricing tactics create a tremendous amount of business pressure on our company simply to sustain our customer base and maintain the existence of our company. From our perspective, it appears very easy for the BOCs to sustain heavy losses in one division and yet offset them from profits made from another division (e.g., sustained losses from the DSL/Broadband Division are offset from the profits gained from their Local, Long Distance, and Business Data Divisions). Due to this ability to cross-subsidize, we believe BellSouth is able to maintain artificial market pressure (engage in price squeeze) on smaller competitors such as independent ISPs, including our company. The medium term effects of these anti-competitive pricing tactics are clearly visible, i.e., large ISPs are exiting the BroadBand Business: Direct TV exited Broadband in 4Q/2002, MSN exited Broadband in Q1/Q2/2003, and AOL is exiting by Q1/2005. The longer term effects, if not addressed, will force smaller ISPs out of business as well. Granting BellSouth's Petition will only accelerate the demise of small independent ISPs."); Mecklenburg Communication Declaration at ¶ 8 ("Our company has also experienced anti-competitive marketplace practices by our ILEC wholesaler/competitor. We've experienced everything from below wholesale cost pricing to intentionally slow installations…."); Supernova Declaration at ¶ 8 ("Our company has also experienced anti-competitive marketplace practices by our ILEC wholesaler/competitors. Our ILEC wholesalers/competitors sell retail DSL services below what it costs our company to purchase the same services at wholesale."); COL Declaration at ¶ 9 ("Our company has also experienced anti-competitive marketplace practices by our ILEC wholesaler/competitor. Our current wholesale price for a DSL line is nearly three times

BellSouth's "DSL Lite" service, which retails for $9.95 per month. Both Sprint and BellSouth wholesale pricing far exceeds the retail pricing available to their own customers. Our company cannot offer our customers the same deals, ultimately making our services less attractive to prospective customers."); Kinex Declaration at ¶ 10 ("Our company has also experienced anti-competitive marketplace pricing by our ILEC wholesaler/competitor. Our current wholesale price for a DSL line exceeds the $24.95 retail price of our ILEC wholesaler/competitor's DSL service by over $10 per line. In addition our ILEC wholesaler/competitor provides its customers with free modems. Our company cannot offer our customers the same deal, ultimately making our services less attractive to prospective customers."); SiteStar Declaration at ¶ 9 ("Our company has also experienced anti-competitive marketplace practices by our ILEC wholesaler/competitor. Our company happily signed up as an ISP partner when our ILEC wholesaler/competitor launched its wholesale DSL program. However, over time our ILEC wholesaler/competitor reduced the retail price of its own DSL service to within $10 and now $5 of our company's wholesale costs. These pricing tactics result in a price squeeze, which if sustained over time will force our company, and others like it, out of business."); CSSLA Declaration at ¶ 8 ("Our company has also experienced anti-competitive marketplace practices by BellSouth, our wholesaler/competitor. Our current wholesale price for a DSL line exceeds BellSouth's retail prices for the same service. In addition, BellSouth provides installation and essential equipment to its DSL customers at costs lower than those charged to us. Our company simply cannot compete on a level playing field with our wholesaler/competitor, ultimately making our services less attractive to prospective customers."); WCK at ¶ 8 ("Our company has also experienced anti-competitive marketplace practices by our ILEC wholesaler/competitor. Our current wholesale price of $25.00 for a DSL line exceeds the $24.95 retail price of our ILEC

wholesaler/competitor's DSL service. In addition, our ILEC wholesaler/competitor provides its customers with free modems. Our company cannot offer customers the same deal, ultimately making our services less attractive to prospective customers."); C-N-S at ¶ 7 ("Our company has also experienced anti-competitive marketplace practices by BellSouth our ILEC wholesaler/competitor for example" … [b]undling and packaging DSL below wholesale cost and leveraging other services, like local dial-tone and long distance to win DSL business. BellSouth stopped deployment of additional service speeds on the PVC in an effort to focus on the EUA products which are more benefit to the large ISP because this uses RADIUS versus sub-interfaces on routing equipment and particularly their on own DSL offering. [sic] The PVC product could be delivered at a higher speed with less load on the BellSouth infrastructure, but it is sold to ISP at the highest cost per delivery rate and only one delivery speed… ."); *see generally*, BluegrassNet Declaration at ¶¶ 5-22.

Undoubtedly, without Title II safeguards, heightened anti-competitive marketplace pricing is a near certainty. Intramodal competition and the continuance of competitive choices for consumers demand the denial of BellSouth's Petition.

5. Economic Regulation is Needed for the Survival of ISPs.

As ISPs across the country will attest, the broadband market is not competitive.[33] Despite this, BellSouth claims the *Computer Inquiry* and common carriage requirements are not

[33] *See* BluegrassNet Declaration at ¶¶ 24-30; LexiSoft Declaration at ¶ 5 ("The existing marketplace lack competitively priced, technologically-equivalent and commercially-available alternatives to BellSouth and/or other ILEC wholesale transmission services which are essential for our company to provide broadband ISP services to our existing and prospective customers"; CSSLA Declaration at ¶ 5 (accord); SiteStar Declaration at ¶ 5 (accord); WebKorner Declaration at ¶ 5 (accord); Kinex Declaration at ¶ 5 (accord); Bayou Declaration at ¶ 5 (accord); GoldCoast Declaration at ¶ 5 (accord); ECSIS Declaration at ¶ 5 (accord); COL Declaration at ¶ 5 (accord); Supernova Declaration at ¶ 5 (accord); Computer Office Solutions Declaration at ¶ 5 (accord); Mecklenburg Communications Declaration at ¶ 5(accord); WCK Declaration at ¶ 5 (accord); C-N-S Declaration at ¶ 5 (accord); Acceleration Declaration at ¶5 (accord).

necessary "because the competitive broadband market already serves that purpose."[34] BellSouth offers no convincing market evidence to support its bare assertions. The lack of empirical support for BellSouth's claims is unsurprising because it is nothing more than wishful thinking on BellSouth's part.

Rather, what marketplace evidence shows is that the Petition's request is nothing less than a death sentence for an entire sector of the economy, the independent ISP. LexiSoft Declaration at ¶ 4 ("Due to existing conditions in the markets in which our company provides ISP services, **our company remains highly, if not entirely, dependent on existing Title II and/or *Computer Inquiry* requirements to obtain access to BellSouth and/or other ILEC wholesale transmission services** which are essential to provide broadband ISP services to our existing and prospective customers.") (emphasis added); CSSLA Declaration at ¶ 4 (accord); SiteStar Declaration at ¶ 4 (accord); WebKorner Declaration at ¶ 4 (accord); Kinex Declaration at ¶ 4 (accord); Bayou Declaration at ¶ 4 (accord); GoldCoast Declaration at ¶ 4 (accord); ECSIS Declaration at ¶ 4 (accord); COL Declaration at ¶ 4 (accord); Supernova Declaration at ¶ 4 (accord); Computer Office Solutions Declaration at ¶ 4 (accord); Mecklenburg Communications Declaration at ¶ 4(accord); WCK Declaration at ¶ 4 (accord); C-N-S Declaration at ¶ 4 (accord); Acceleration Declaration at ¶ 4 (accord).

While it is true that some ISPs can carry on using the ever-declining dialup method and a few will find alternative carriers, those who are dependent now on ILEC DSL services are likely to be forced out of the business. *See* BluegrassNet Declaration at ¶ 23 (stating that it "considers the 'telephone system' to be its primary and in most instances exclusive means to get broadband information to its customers."); WebKorner Declaration at ¶10 ("Bottom line is that in the markets we serve, there are no alternatives to BellSouth."); Bayou Declaration at ¶ 10 ("… in the

[34] Petition at p. 6.

markets we serve, there are no alternatives to BellSouth."); GoldCoast Declaration at ¶ 10 ("… in the markets we serve, there are no alternatives to BellSouth.").

The Competitive Local Access Carrier alternative has been largely shut out by the Commission's recent decisions on line sharing, "fiber to the curb", unbundled fiber feeder subloops, and high-capacity interoffice facilities. Fewer CLECs will be able to offer competitive DSL in the future, so ISPs will have no place to turn.[35] As is set forth below, many ISPs find the telephone system to be not only the primary, but the exclusive means to get broadband information to its customers.

6. For Most Small ISPs, the "Telephone System" is the Primary and Sometimes Exclusive, Means to Get Broadband Information to its Customers.

FCC precedent rejects forbearance *except* where there is clear and substantiated evidence of a robust competitive market.[36] BellSouth claims that the telephone network is no longer the primary means for ISPs to obtain access to customers and that access is being provided by satellite, wireless and power-lines. This simply is not true and BellSouth neglects to present any evidence to show otherwise. Indeed, with the migration to broadband technologies and lack of broadband access by any other means, ISP reliance on the incumbent's telephone network is as important today as ever.

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[35] *See* Kinex Declaration at ¶ 8; Bayou Declaration at ¶ 9; GoldCoast Declaration at ¶ 9; Computer Office Solutions Declaration at ¶ ¶ 7-8); Acceleration Declaration at ¶ 9.

[36] *In the Matter of Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, Sixth Memorandum Opinion and Order, 14 FCC Rcd 10840 (1999) (incumbent LECs failed to meet first prong of Section 10 forbearance standard where incumbents did not demonstrate that they face "substantial competition"); *see also*, *In the Matter of Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, Third Memorandum Opinion and Order, 14 FCC Rcd. 10816, ¶ 12 (1999) (first prong of Section 10 forbearance test not met where "independent LECs have sufficient ability through their control of bottleneck facilities to harm the in-region long distance services market by engaging in cost misallocation, access discrimination, and price squeeze); *In the Matter of 1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers; United States Telephone Association's Petition for Forbearance from Depreciation Regulation of Price Cap Local Exchange Carriers*, Report and Order in CC Docket No. 98-137 Memorandum Opinion and Order in ADS 98-91, 15 FCC Rcd. 242, ¶ 54 (1999) (under first prong of forbearance test, incumbent LECs failed to "demonstrate [] that the local exchange market is sufficiently competitive" to warrant forbearance).

In 2004, more Internet subscribers are using broadband than dialup connections.[37] This has led to stagnating demand and declining volumes for dialup-based ISPs, from giant AOL to the smallest mom-n-pop ISP. Combine this market reality with ILEC demands for exorbitant switched access charges for ISP-bound calls *if* the ISP's modem is not within the local calling area of the caller and ISPs have good reason to want to migrate to DSL and other broadband delivery platforms.

However, as has been touched upon earlier and described in greater detail below, for one reason or another, from technological limitations to insufficiently competitive market forces, these "other broadband delivery platforms" remain out of reach to the small, independent ISP. The only broadband delivery option that is available is ILEC DSL and this option remains available only through Title II and *Computer Inquiry* dictates, which, if removed, would place ILEC DSL equally out of reach to FISPA members and the hundreds, if not thousands, of their ISP counterparts throughout America.

- ***Wireless and Satellite Options Are Limited and Generally Unacceptable for ISPs.***

BellSouth proffers, albeit again without the support of any detailed evidence, that ISPs have satellite and wireless options and therefore the telephone network is no longer the primary vehicle for delivery. Such a position is fatally flawed in that it fails to recognize that satellite and wireless services are neither reliable nor affordable for most ISPs and, thus, are *not* viable options. Satellite and wireless, therefore, *cannot* be considered a contributing factor in the competitive equation. *See* WebKorner Declaration at ¶8 ("Our company investigated the possibility of providing service via Satellite. After investigation, we determined that Satellite service is not technologically comparable to landline broadband due to latency and inadequate

[37] *See* "Broadband passes dial-up in U.S." Eric Auchard (citing Neilsen/Net ratings report that concludes 51% of U.S. residential users connect to the Internet via broadband links), found at www.msnbc.msn.com/id/57509681.

upload/download speeds."); BluegrassNet Declaration at ¶¶ 24-27 ("While wireless and satellite technology are sometimes available, they are not reliable enough for BluegrassNet to be considered ready for business class services. This is especially true in more urban areas … there are tremendous difficulties in the open spectrums in the more populated areas at this particular time …. Not only has BluegrassNet attempted to run wireless, but our competitors … have attempted the same thing, and up until this point, all but one have resigned themselves to the fact that there is too much interference and not enough reliability to make it viable for business purposes."); Bayou Declaration at ¶ 8 ("… Our experiences selling our ISP services through Satellite over the past one and a half years have been poor. First, the upfront equipment costs the Satellite company requires customers to pay are unattractive and, second, the technology utilized is not the equivalent of our existing ILEC wholesale supplier. In other words, the upload/download speeds simply were not comparable and is not satisfactory to our existing or prospective customers."); GoldCoast Declaration at ¶ 8 ("Our company investigated Broadband over … Satellite. Our research concluded that … Satellite service is not technologically comparable to landline broadband due to latency and inadequate upload/download speeds. Our core target audience is businesses. There is virtually no way to serve businesses with satellite, especially in downtown areas, where there is not line of sight.); COL Declaration at ¶ 8 ("Our company also explored providing broadband ISP services through a Satellite company offering ISP service in our market. Our exploration concluded abruptly when we determined that the technology used by the Satellite company was not technologically comparable to landline service. In other words, the upload/download speeds simply were not comparable and would not be satisfactory to our existing or prospective customers."); Mecklenburg Communications Declaration at ¶ 7 ("Our company explored providing broadband ISP services through a Satellite

company offering ISP service … in our market. Through such exploration our company concluded that providing service via … Satellite would be cost-prohibitive, particularly in the rural areas served by our company."); SiteStar Declaration at ¶ 8 ("Our company also explored providing broadband ISP services through iSat, a Satellite company offering ISP service in our market. Our company began offering iSat services but due to problems encountered with installation and reliability, most customers who signed up for the service have cancelled. Currently, our company serves less than 10 customers via iSat. In the final equation, the technology utilized by iSat was not the equivalent of our existing ILEC wholesale supplier"); LexiSoft Declaration at ¶ 7 ("Our company explored providing broadband ISP services through … Satellite … we have received no cooperation from the Satellite provider."); WCK Declaration at ¶ 7 ("Our company explored providing broadband ISP services through the Satellite company offering ISP service in our market. This exploration did not progress very far because of two reasons: First, the wholesale pricing offered by the Satellite company was unattractive and, second, the technology utilized was not the equivalent of our existing ILEC wholesale supplier. In other words, the upload/download speeds simply were not comparable and would not be satisfactory to our existing or prospective customers.").

Thus, the reality is that few ISPs have succeeded in going wireless.[38] As described by the ISPs in their declarations, there are many reasons. Licensed spectrum is very costly in most areas, if available at all. There is little evidence of licensed spectrum owners offering ISPs a wholesale access service to replace DSL. Instead, they are more likely to provide a retail ISP service over their spectrum, to compete with less-well-capitalized ISPs who cannot afford the spectrum. Unlicensed spectrum is limited both in availability and power. Because of the low

[38] Pew Internet Project Data Memo (April 2004) (reporting that fixed-satellite and wireless accounted for only 3% of the broadband market).

power limit, range is necessarily limited. The best results are found in rural areas that are flat (to avoid being blocked by hills), dry (to avoid rain and fog attenuation) and treeless (to avoid signal absorption). Thus wireless-ISPs are most heavily concentrated in the area between the Rocky Mountains and the Mississippi River, from Texas to Kansas. A few opportunistically operate in coastal regions, and in flat areas such as Florida. But most ISPs lack the combination of clear paths and subscriber density needed to make unlicensed wireless access profitable.

In urban areas, interference is also a problem. The unlicensed bands are occupied by cordless phones, microwave ovens, video extenders, home wireless local area networks, public access points, Bluetooth devices, and other sources of interference. The Commission should certainly continue to support wireless operation, but wireless access can never fully substitute for wireline access and it certainly does not now.

- ***The CLEC "Alternative" is Not Attractive Now and Will Be Less Attractive if Forbearance is Granted.***

BellSouth argues that independent ISPs will have alternative avenues of accessing their customers in a world in which BellSouth and other ILECs are not subject to Title II and *Computer Inquiry* rules. Had BellSouth's requested forbearance been granted some years ago, prior to the dot-com collapse, a time in which there were several hundred, well-funded CLECs in existence, and had these CLECs avoided the pitfalls of overbuilding and opportunistic blue sky forecasting, in short, at a time when there was in fact a viable presence of a multitude of CLECs, BellSouth might have argued with some credibility that the impact of forbearance on independent ISPs would be minimal. But the rules have turned on the viability of CLECs and their environment today is far more hostile than in 2000 or before.[39]

[39] *See e.g.,* Computer Office Solutions Declaration at ¶¶ 7-8; Bayou Declaration at ¶ 9; GoldCoast Declaration at ¶ 9; Kinex Declaration at ¶ 8; WebKorner Declaration at ¶ 9; Acceleration Declaration at ¶ 9.

Line sharing has been removed by the *Triennial Review Order* ("TRO"), denying CLECs any semblance of a level playing field on which to compete with RBOC DSL operations. The TRO did permit the UNE Platform to take the place of RBOC voice service, but that too is nearing its sunset, thanks to the *USTA II* decision and the Commission's December 15, 2004 *Remand Order*. The Commission's Fiber-to-the-Home ("FTTH") rule allows the ILEC to cut off CLEC DSL access to subscribers whose home is overbuilt with FTTH, and allows green field FTTH sites to have no competition at the CLEC level at all, unless of course a CLEC digs up the same streets itself – hardly a likely occurrence, nor a particularly smart one if you ask the city, town or locality whose streets must be constantly disrupted to accommodate competition in the last mile.

BellSouth has then extended this via the Commission's grant of its Fiber-to-the-Curb ("FTTC") petition. Now BellSouth and her sister RBOCs need merely deploy a Digital Loop Carrier system in the general vicinity of a subscriber and it need no longer provide loops to CLECs. There is little doubt that the RBOCs will take advantage of this to further reduce the number of retail subscribers who can be served by CLECs.[40] Thus, the ISPs will have lost their most promising and yet unrealized alternative means of broadband access supply.

- ***Broadband Over Power Is Not A Viable Option***

That BellSouth would suggest broadband over power is proof of a robust, competitive marketplace is a joke. Broadband over power is non-existent in most markets. *See* Kinex Declaration at ¶ 9 ("Our company has researched the availability of Broadband over Power Lines

[40] If forbearance is granted, FISPA posits that FTTx will not only *not* bring more competition to the homes passed, but will result in a dramatic drop in competition because it will not be subject to common carriage and will not be available to ISPs via tariffed access services. Even dial-up may be profoundly impacted because new FTTx systems need not implement the high-quality TDM-based telephone service, such as is offered by Integrated DLC, that modems need in order to get maximum performance.

("BPL"). However, the local utility company rolling out BPL is only in testing stages and is not interested in providing wholesale services at this time."); GoldCoast Declaration at ¶ 8 ("Our company investigated Broadband over Power Lines …. Our research concluded that BPL is not available in our market…."); Mecklenburg Communications Declaration at ¶ 7 ("Our company explored providing broadband ISP services through … a utility company offering Broadband over Power Lines in our market. Through such exploration our company concluded that providing service via …the utility company would be cost-prohibitive, particularly in the rural areas served by our company."); Acceleration Declaration at ¶ 8 ("Our company has also investigated Broadband over Power Line technology. Currently, BPL is experimental and not deployed or commercially available in our service area.").

- ***Summary Conclusion***

In summary, it is not surprising that BellSouth attempts to wrap its quest for forbearance in cloth of ISPs using cable systems. But that cloth is threadbare and moth-eaten because the number of non-affiliated ISPs on cable systems is paltry with no signs of significant and meaningful growth. Similarly, there are some ISPs that are operating using dial-up access, but this is both a rapidly declining means of access and, of course, not a true "broadband" service. There are also ISPs that use alternative carriers, *i.e.*, CLECs. Again, a handful, because CLECs are also few in number and becoming fewer because of the failure of the 1996 Act, misplaced reliance on the effective implementation of the Act by the Commission[41] and overly optimistic views of the market opportunity. And of those CLECs that do exist or remain, most of them will

[41] The alternative of using CLEC services has been largely shut down by the Commission's recent decisions on line sharing, "fiber to the curb", unbundled fiber feeder subloops, and high-capacity interoffice facilities.

be further hamstrung by the withdrawal of their access to the use of the monopoly networks as a result of the forbearance sought.[42]

A grant of forbearance is therefore another nail, perhaps the final one, in the coffin of an entire sector of broadband service providers - the independent ISPs.

B. FORBEARANCE WOULD HARM CONSUMERS

In order to satisfy the second prong of section 10, BellSouth must demonstrate that the regulations at issue are not necessary "for the protection of consumers."[43] BellSouth has not shown, nor can it show, that existing marketplace forces would be adequate to constrain its market power and ensure that consumers are protected. Indeed, the relief BellSouth seeks would negatively affect consumers in several ways.

Without Title II regulations, BellSouth is free to cross-subsidize between unregulated and regulated services.[44] The Commission has found that cross-subsidization can harm consumer choices in the unregulated market making Title II cost allocation rules a necessary safeguard against "improperly shifting costs from unregulated to regulated offerings" that in turn "can have adverse impacts … on competition in unregulated markets, by providing an opportunity for carriers to charge artificially low prices for their unregulated goods and services."[45]

Also, BellSouth may charge rates that raise rival costs such as increasing wholesale rates to ISPs, which in turn harms consumers. It is well established that a lack of robust price

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[42] In the near term future, fewer and fewer of the already few CLECs will be able to offer comparative DSL that is able to keep up a competitive pace with the RBOCs' DSL. Very soon then, ISPs will have no place to turn.
[43] 47 U.S.C. § 160(a)(2).
[44] *See* discussion at Section IV(A)(4) *supra,* for a small sampling of instances where ILECs already are engaging in anti-competitive marketplace pricing.
[45] *In the Matter of Amendment of Section 64.702 of the Commission's Rules (Third Computer Inquiry),* Report and Order, 104 F.C.C. 2d 958 ¶ 234 (1986) (history omitted).

competition may lead to rates that are excessive and harm consumers.[46] Thus, regulation is necessary for the protection of consumers. *See* CSSLA Declaration at ¶ 10 ("Either directly or indirectly, our company, our customers and the communities we serve will be harmed if the Commission grants the relief requested by BellSouth.") (emphasis added); LexiSoft Declaration at ¶ 8 (accord); SiteStar Declaration at ¶ 10 (accord); WebKorner Declaration at ¶ 11 (accord); Kinex Declaration at ¶ 11 (accord); Bayou Declaration at ¶ 13 (accord); GoldCoast Declaration at ¶ 11 (accord); ECSIS Declaration at ¶ 9 (accord); COL Declaration at ¶ 10 (accord); Supernova Declaration at ¶ 9 (accord); Computer Office Solutions Declaration at ¶ 12 (accord); Mecklenburg Communications Declaration at ¶ 9 (accord); WCK Declaration at ¶ 9; C-N-S Declaration at ¶ 8; Acceleration Declaration at ¶ 11; *see* also, BluegrassNet Declaration at ¶ 31 ("BluegrassNet believes that removing regulatory protection from access to ILEC broadband would hurt BluegrassNet's customers, and would not be in the best interest of the public.").

1. Forbearance will Harm those Business Customers Whose Access is Provided by Small ISPs.

One of the many shortcomings of the Petition is that its analysis focuses exclusively on broadband provisioning geared toward the residential user and fails to acknowledge, let alone address, the business class customers and their market needs. Many small ISPs' customer base consists of business customers.[47]

[46] *Special Access Forbearance Order* ¶ 34 ("Absent a sufficient showing of competition, it is clear that regulation of the BOC petitioners' special access and high capacity dedicated transport services is necessary to protect consumers").

[47] LexiSoft Declaration at ¶ 6; CSSLA Declaration at ¶ 6; SiteStar Declaration at ¶ 6; WebKorner Declaration at ¶ 6; Kinex Declaration at ¶ 6; Bayou Declaration at ¶ 6; GoldCoast Declaration at ¶ 6; ECSIS Declaration at ¶ 6; COL Declaration at ¶ 6; Supernova Declaration at ¶ 6; Computer Office Solutions Declaration at ¶ 6; Mecklenburg Communications Declaration at ¶ 6; BluegrassNet Declaration at ¶ 4; WCK Declaration at ¶ 6; C-N-S Declaration at ¶ 6; Acceleration Declaration at ¶ 6.

As the ISPs attest, access to low-cost broadband transport has revolutionized the every day practices of businesses across the country.[48] Forbearance will likely cause the loss of productivity for these businesses and increased costs by forcing the businesses to rely on the more expensive T-1 and dedicated data transport lines.[49] Thus, the negative impact forbearance will have on the countless business customers that rely on ISPs for access is yet another reason why forbearance is improper.

2. *Computer Inquiry's* Administrative Costs Should Have No Bearing on the Section 10(a) Analysis.

BellSouth dedicates a significant portion of its Petition describing the regulatory aggravations it must endure and the costs its must expend to comply with the *Computer Inquiry* rules. These rules, BellSouth argues, affectively harm consumers by raising costs and impeding competition and investment. The Petition views the *Computer Inquiry* mandates as a nuisance, a useless rule that merely increases its cost of doing business and hinders investment, so it says. From its own narrow point of view, there is a grain of truth to such an analysis: *Computer Inquiry* is indeed a nuisance to monopoly local exchange carriers, but that is its purpose.

All in all, BellSouth's arguments are misguided. It is agreed that, *all things being equal*, economic regulation is not necessary in competitive markets. But section 10(a) does not permit the Commission to balance potential market power harms that would occur from deregulating a company that controls essential access facilities against the benefit that such deregulation might increase investment incentives. Such balancing is foreclosed by section 10(a)'s plain language.

Undoubtedly, BellSouth must incur administrative costs related to compliance with the regulations. However, as set forth in more detail below, a reduction in BellSouth's costs of doing business does not justify the scrapping of the *Computer Inquiry* rules. Finally, the

[48] BluegrassNet Declaration at ¶¶ 6-22.
[49] *Id*. at ¶ 14.

Commission cannot adopt BellSouth's position as it has failed, once again, to provide any hard data to support its sweeping conclusions.

C. FORBEARANCE IS NOT IN THE PUBLIC INTEREST.

As stated in Section I of this Opposition, BellSouth's goal of forbearance can be read and understood as a request for the government-sanctioned right to be unreasonable and unduly discriminatory. Stripped of all the pseudo arguments and self-serving rationalizations presented by BellSouth, the only way to interpret a request to lift the Title II obligations in regard to broadband DSL services is that BellSouth does not want its future broadband activities to be encumbered with the duties to be reasonable or be restrained in the slightest from playing favorites with BellSouth's most favored ISP – BellSouth.net. Sections II and III of this Opposition lay out the historical and factual case as to why this result is not in the public's interest. It bears repeating that more, not less, competition in the market for wireline broadband market, and all communications markets, is and always should be the Commission's paramount goal. Only by ensuring that the conditions needed to stimulate such competition remain in place can the Commission be assured it has satisfied its obligation to the public. The Commission must learn from its long track record of prematurely de-regulating dominant companies and refrain from doing so here.

Since the early 1970's, common carrier regulation has been under attack for all its perceived and real deficiencies. It cannot be denied that in many cases, deregulation has "worked." Competition has changed the entire landscape of long distance and terminal equipment. However, the real landmark decisions that led to the creation of competition in these

venues were not the result of the Commission's leadership, but that of the courts. It took two decisions by the Courts of Appeals to open the long distance market to "true" competition after AT&T had buffaloed the Commission into narrowing its watershed *Specialized Carrier* decision to preserve the vast majority of AT&T's monopoly over long distance.[50] And, of course, it was the courts, not the Commission which ultimately divested AT&T of its control of bottleneck local exchange facilities through the MFJ.

Now, more than twenty years later, it is the same local networks that BellSouth hopes to turn into a new kind of bottleneck, not one to prevent competitive access to customers wanting to choose a different long distance carrier, but to prevent customers from choosing a different broadband ISP provider. The technical nature of the services may have changed, but the fundamental aspects of the anti-competitiveness involved has not.

Deregulation is not a panacea that ensures better government, a better economy, a more civilized society or greater equality for all peoples. But, merely because the application of common carriage obligations in today's environment may seem somewhat anachronistic, when considered in light of Congress' intent for what the Communications Act is intended to achieve and sustain, such a conclusion simply is not possible. The Commission expressed it very well –

> By the 1996 Act, Congress intended to facilitate the introduction by private firms of new consumer services, service providers and technologies by promoting the development of competition and deregulation in all telecommunications markets.* The Act instructs the Commission … to open telecommunications markets to competition … The proper functioning of competitive markets, however, is predicated on consumers having access

[50] *MCI Telecomm. v. FCC*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) Execunet I (holding that the FCC erred in forbidding use of private-line facilities to provide a service equivalent to MTS, because it had never previously determined that preservation of the MTS monopoly was in the public interest); *see also MCI Telecomm. v. FCC*, 580 F.2d 590 (D.C. Cir.), *cert. denied*, 439 U.S. 980 (1978) Execunet II.

> to accurate, meaningful information …Unless consumers are adequately informed about the service choices available to them and are able to differentiate among those choices, they are unlikely to be able fully to take advantage of the benefits of competitive forces.
>
> *2. The principal goal of the Act is to 'provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. *See* Joint Statement of Managers, S.Conf. Rep. No. 104-230, 104th Cong., 2d Sess. Preample (1996). *In the Matter of Truth-in-Billing and Billing Format,* CC Docket No. 98-170, First Report and Order and Further Notice of Proposed Rulemaking, FCC 99-72, ¶2 (1999).

The Commission's statements were made in the context of the need for clearer and more informative billing by service providers, but the relevance here is the Commission's connection of *consumer choice* with *competitive forces*. A grant of forbearance will deny consumer's their choice of service providers and the variety of services that only a diverse and abundant source of alternative providers can offer. In today's demonstrably uncompetitive marketplace for alternative broadband access supply, removal of Title II and *Computer Inquiry* rules will throw consumers to the wolves. They will be left with nothing to select from but what BellSouth and what her sister duopolies choose to offer.

This does violence to the expressed intent of Congress in enacting the 1996 Act. But in truth, that intent has been embodied in the Act since its adoption 70 years ago. Section 151 of the Act provides that –

> … the purpose of regulating interstate and foreign commerce in communications [is] to make available, so far as possible, to all people of the United States, without discrimination … a rapid, efficient … wire and radio communication service with adequate facilities at reasonable charges … (Emphasis added.) 47 U.S.C. §151.

It is clear that the duty of this Commission is to ensure reasonable and non-discriminatory communications services when provided by common carriers under Title II or by any provider under Title I. The Commission's duty is to adopt policies, whether they are implemented by regulation or deregulation, that provides to all the people so far as possible nondiscriminatory services with adequate facilities at reasonable rates.

In short, BellSouth cannot escape its duties to operate reasonably and non-discriminatorily by shedding its Title II obligations any more than the Commission can shirk its duties to see to it that BellSouth does operate reasonably and non-discriminatorily, whether by Title II or Title I.

The forbearance BellSouth seeks will have a profound impact on businesses in an industry enmeshed in this country's telecommunications culture. The amounts of money at stake also reach into the billions of dollars. The continued existence of independent ISPs, and the diversity of choices to the public rest on their ability to continue to have access to the network facilities necessary to deliver their services. Indeed, the Commission must admit that, given the uncertain nature of the future of a competitive broadband communications market, independent ISP providers foreclosed from obtaining access to their customers may ultimately be left holding the remnants of their once diverse and competitively intense broadband offerings. Precisely because forbearance would have such a profound effect on the ability of businesses to compete in the twenty-first century technology of broadband communications, it is incumbent upon the Commission to provide more than its preconceived judgments that overtly favor the incumbents

to justify such a sacrifice of broader public interests and the disenfranchisement of small businesses.

V. SECTION 706 DOES NOT, IN AND OF ITSELF, JUSTIFY FORBEARANCE.

As is set forth above, BellSouth has not provided the necessary evidence to satisfy any of the three prongs of section 10(a). Notwithstanding this, in a desperate attempt to circumvent the requirements of section 10(a), BellSouth relies on section 706 for support of its quest for forbearance.[51] BellSouth seeks to skirt the section 10(a) requirements by presenting lofty arguments that forbearance from regulation would serve the goals of section 706. However, the three prongs of section 10(a) are conjunctive.[52] Thus, even if the Commission believed section 706 somehow supported BellSouth's public interest claim under section 10(a)(3), the Commission would still have to reject the Petition because it fails to satisfy the requirements of sections 10(a)(1) and 10(a)(2).

VI. SECTION 10(d) PROHIBITS FORBEARANCE FROM SECTION 251(c) AND 271 REQUIREMENTS.

Section 10(d) places an explicit "[l]imitation on the remainder of section 10," providing that the "Commission may not forbear from applying the requirements of section 251(c) or 271 … until it determines that those requirements have been fully implemented."[53] BellSouth's failure to satisfy the requirements of section 10(d) mandate the denial of the Petition.[54] BellSouth presents no convincing evidence to support the conclusion that a robust wholesale market exists that enables competing providers to obtain access to the telecommunications

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[51] *See* Petition at pp.16-17 where BellSouth argues section 706 establishes a duty whereby the Commission must "'remove barriers to infrastructure investment' in order to 'promote broadband competition.'"
[52] *CTIA v. FCC*, 330 F.3d at 509.
[53] 47 U.S.C. §160(d).
[54] Memorandum Opinion and Order, *Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, 18 FCC Rcd. 23525, ¶¶5, 9 (2003).

services and facilities they require to enter the market without the need for continued enforcement of section 251(c) or 271. Indeed, the declarations presented by FISPA members provide solid evidence that directly contradicts BellSouth's uncorroborated claims.[55]

BellSouth cannot satisfy the requirements of section 10(d) because it continues to exercise market power over the facilities that ISPs use to connect consumers to the Internet and to provide IP-based content and applications. Thus, the request for forbearance must be denied.

VII. THE REGULATORY FLEXIBILITY ACT DEMANDS DENIAL OF THE PETITION.

"The American people deserve a regulatory system that works for them, not against them."[56]

Almost 25 years ago, Congress passed the Regulatory Flexibility Act ("RFA") requiring each federal agency to conduct a regulatory flexibility analysis of the impact of its actions on small businesses.[57] The RFA offered a unique opportunity to root out some of the institutional biases that work against the small entrepreneur. The RFA was designed to place the burden on the government to review all regulations to ensure that, while accomplishing their intended purposes, they do not unduly inhibit the ability of small entities to compete. The major goals of the Act are:

1. to increase agency awareness and understanding of the impact of their regulations on small business,
2. to require that agencies communicate and explain their findings to the public, and

[55] *See* Exhibits A through P.

[56] President William J. Clinton, Executive Order No. 12866, September 30, 1993, which, among other things, reinforced the RFA. To ensure that the agencies' regulatory programs were consistent with the philosophy of weighing the costs and benefits of available regulatory alternatives, E.O. 12866 required agencies to abide by a number of principles; one of which was that each agency shall tailor its regulations to impose the least burden on society, including businesses of different sizes, consistent with obtaining the regulatory objectives.

[57] 5 U.S.C. § 601

3. to encourage agencies to use flexibility and to provide regulatory relief to small entities.

In 1996, supported by President Clinton, Congress strengthened the RFA and provided for judicial review of agency compliance with the law. Now, actions (or inactions as may be the case here), taken by the Commission are directly challengeable in court.

Today, the RFA, is intended to give small businesses[58] a special opportunity to participate in the development of regulations that significantly affect them. It marks a recognition that federal agencies, in order to develop awareness of their rulemaking activities that affect small businesses, must make greater outreach efforts. As discussed above, the *Computer Inquiry* and Title II rules directly affect the public interest and interests of independent ISPs. Without the rules, any existing competitiveness in the broadband market will disappear. The ISPs' survival depends on access from the ILECs and to that end, rely on the safeguards of Title II and *Computer Inquiry*.[59] The Commission cannot ignore or overturn established policy designed in large part to protect these small ISPs unless it does so on a reasoned basis that rests on an adequate record and is clearly and convincingly explained by the Commission.[60]

[58] The RFA also is intended to protect small governments and small non-profit enterprises. 5 U.S.C. § 601.

[59] LexiSoft Declaration at ¶ 4 ("Due to existing conditions in the markets in which our company provides ISP services, **our company remains highly, if not entirely, dependent on existing Title II and/or *Computer Inquiry* requirements to obtain access to BellSouth and/or other ILEC wholesale transmission services** which are essential to provide broadband ISP services to our existing and prospective customers.") (emphasis added); CSSLA Declaration at ¶ 4 (accord); SiteStar Declaration at ¶ 4 (accord); WebKorner Declaration at ¶ 4 (accord); Kinex Declaration at ¶ 4 (accord); Bayou Declaration at ¶ 4 (accord); GoldCoast Declaration at ¶ 4 (accord); ECSIS Declaration at ¶ 4 (accord); COL Declaration at ¶ 4 (accord); Supernova Declaration at ¶ 4 (accord); Computer Office Solutions Declaration at ¶ 4 (accord); Mecklenburg Communications Declaration at ¶ 4 (accord); WCK Declaration at ¶ 4 (accord); Acceleration Declaration at ¶ 4 (accord); C-N-S Declaration at ¶ 4 (accord) BluegrassNet Declaration at ¶¶ 23 – 29.

[60] Specifically, in rulemaking, all agencies are required to take some or all of the following steps in order to solicit input from small entities: publish a semiannual regulatory agenda; provide notice of rulemakings expected to affect small entities; publish proposed rules in the Federal Register; provide a description of the impact a proposed rule is expected to have on small entities as determined in initial analysis; publish notice of proposed rules in publications likely to be obtained by small entities, such as industry publications or trade association newsletters; send direct notifications of proposed rules to interested small entities or their representatives; and conduct public forums on proposed rules to solicit comments using public meetings or computer networks.

Therefore, granting BellSouth's Petition, either expressly or by inaction, would violate the RFA and the case law interpreting it.[61]

Undoubtedly, the forbearance BellSouth seeks will have an adverse effect on small ISP businesses. In fact, the continued existence of independent ISPs and the diversity of choices to consumers is in jeopardy if the current regulatory scheme is cast aside. Small businesses, such as the independent ISPs are important not only to the growth of the Internet, but to the growth of the U.S. economy. If small businesses are expected to be the engine that grows the U.S. economy and creates jobs, the engine must be fed, not starved. De-regulating the ILECs, as BellSouth requests in its Petition, puts the brakes on the small ISP engine at the very time there is a need for the accelerator to be at full throttle. The public interest is best served when there is a vibrant, growing small business economy that is creating jobs and developing new technology, technology that in turn creates whole new industries. Because forbearance would have such a profound effect on the ability of businesses to compete in the twenty-first century technology of broadband communications, it is incumbent upon the Commission to provide more than its prejudices for incumbents to justify such a sacrifice of broader public interests and the disenfranchisement of small businesses. To do otherwise would be an injustice and a direct violation of the RFA.

[61] BellSouth may try to argue that section 10 can be interpreted to overturn these precedents, but the argument is contrary to logic and rational decision-making, the general requirements that govern agency decision-making under the APA and the requirements of the RFA that the Commission must determine what affect its actions (or inactions) has on small businesses.

VIII. CONCLUSION

BellSouth's assertions fail to provide relevant factual support for the relief it requests. The Petition contains broad statements that the broadband market is optimally competitive, and generalized conclusions about the need to lift Title II restrictions on the use of its network by other competitive service providers. Something more is needed. The forbearance BellSouth seeks will have a profound impact on businesses in an industry enmeshed in this country's telecommunications culture. The amounts of money at stake reach into the billions of dollars. The continued existence of independent ISPs and the diversity of choices to consumers rest on their ability to continue to have access the network facilities necessary to deliver their services. Indeed, the Commission must admit that, given the uncertain nature of the future of a competitive broadband communications market, independent ISP providers foreclosed from obtaining access to their customers may ultimately be left holding the remnants of a stillborn offering. Precisely because forbearance would have such a profound effect on the ability of businesses to compete in the twenty-first century technology of broadband communications, it is

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incumbent upon the Commission to provide more than its prejudices for incumbents to justify such a sacrifice of broader public interests and the disenfranchisement of small businesses.

RESPECTFULLY SUBMITTED,

THE FEDERATION OF INTERNET SOLUTION PROVIDERS OF THE AMERICAS

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